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Mind the Gap: A Systematic Approach to the International Criminal Court's Arrest Warrants Enforcement Problem

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Mind the Gap: A Systematic Approach to the International Criminal Court's Arrest Warrants Enforcement Problem

Nadia Banteka†

International Criminal Courts and Tribunals (“ICCTs”) have been established on a belying enforcement paradox between their significant mandate and their inherent lack of enforcement powers due to the absence of systemic law enforcement. This Article is premised on the idea that ICCTs fail to procure substantial results due to their delusive persistence in rejecting the factoring of politics in their operation. Thus, I suggest a perspective for arrest warrant enforcement that not only recognizes the relevance of politics but also capitalizes on it. I argue that by fully comprehending its enforcement tools and making use of its political role, the International Criminal Court (“ICC”) may increase its rates in the apprehension of suspects and secure higher levels of judicial enforcement. Based on different compliance theories, I argue that the Office of the Prosecutor of the ICC (“OTP”) can improve compliance with ICC arrest warrants by making use of third states and non-state actors. In Part I, I address the way states and international actors may assist the OTP towards unwillingness to arrest states through inducements, reputational sanctions, and support for enforcement agencies. I propose that external pressure in the form of positive inducements (i.e., membership and development aid) or negative inducements (i.e., travel bans and asset freezes), as well as condemnation and reputational damage towards non-compliant states, are likely to increase compliance with arrest warrants. In Part II, I examine a strategy for the OTP towards states that are willing to arrest but are unable to do so. In these cases, the OTP would benefit from improving its institutional capacity to identify and use overlapping interests with activist states in the field of human rights and international justice through the establishment of a diplomatic arm within its Jurisdiction, Complementarity, and Cooperation Division. I unpack the question of what this engagement may look like by examining such a potential relationship between the United States and the ICC. Finally, in Part III, I focus on the instances where civil society

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has the ability to influence third states or situation states to assist in the execution of arrest warrants. Here, I argue that the OTP ought to include different actors within the global civil society (such as NGOs and transnational networks) during its efforts.

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Introduction

The issue of the alleged influence of politics over international law is far from a new phenomenon.¹ Political overtones in international law have commonly been approached with skepticism and aggravation due to their close affiliation with notions of power, interests, and a stale conception of state sovereignty.² Despite the triumph of legal positivism as the dominant school of thought, the twentieth century saw a procession of claims that international law was undergoing a rush of fundamental change, moving closer to the individual than ever before.³ All this took place in an environ-

1. See WOLFGANG FRIEDMANN, *THE CHANGING STRUCTURE OF INTERNATIONAL LAW* 3 (1964).

2. See PHILLIP JESSUP, *A MODERN LAW OF NATIONS: AN INTRODUCTION* 8-9 (1948).

3. See generally JORGE AMERICANO, *THE NEW FOUNDATIONS OF INTERNATIONAL LAW* (1947); FRIEDMANN, *supra* note 1; JESSUP, *supra* note 2; ALFRED ZIMMERN, *THE LEAGUE OF NATIONS AND THE RULE OF LAW 1918-1935* (1936).

ment where the particles of state unilateralism and multilateralism interacted under inelastic collisions, and where states were constantly confronted with the Hedgehog's dilemma.⁴ This new dynamic of international law called for a reconstruction of the endemic relationship between international justice and politics in light of an increasingly individualized and interconnected world.

The atrocities of World War II ("WWII") compelled an international outcry resulting in univocal demand for international criminal justice.⁵ The subsequent humanitarian and human rights developments in international law have been primarily based on this momentum. A new judicial world emanated, where crimes against international law were no longer committed by abstract entities but by men⁶ who were to be held accountable for their actions before a court of law.⁷ The end of the Cold War coincided with the rise of ethnic conflicts sealed by mass murders and egregious human rights violations, thus transpiring a renewed interest by "like-minded states"⁸ to rise to the occasion.⁹ This climate broke new ground in the established international law enforcement regime, and spurred departure from the single, skeletal notion of state responsibility to individual accountability through criminal jurisdiction before International Criminal Courts and Tribunals ("ICCTs").¹⁰

This new system, however, includes caveats.¹¹ One of its most vulnerable areas is the "arrest and surrender" system for indicted individuals.¹²

4. See ARTHUR SCHOPENHAUER, 2 PARERGA UND PARALIPOMENA: KLEINE PHILOSOPHISCHE SCHRIFTEN 651–52 (Eric F.J. Payne trans., Oxford Univ. Press 1974) (1851) (depicting a group of hedgehogs who need to huddle together for warmth yet are struggling to find the optimal distance where they may feel sufficiently warm without hurting one another. Inevitably, the hedgehogs will be faced with the dilemma of sacrificing either warmth for comfort or comfort for warmth); see also GEORG SCHWARZENBERGER, POWER POLITICS: A STUDY OF WORLD SOCIETY 12 (1964).

5. See Frédéric Mégret, *Epilogue to an Endless Debate: The International Criminal Court's Third Party Jurisdiction and the Looming Revolution of International Law*, 12 EUR. J. INT'L L. 247, 261 (2001).

6. See 1 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 223 (1947).

7. See Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, art. 1, Aug. 8, 1945, 82 U.N.T.S. 279; Charter of the International Military Tribunal, art. 7, Aug. 8, 1945, 82 U.N.T.S. 284, 288.

8. See Press Release, Secretary General, Secretary-General Urges 'Like-Minded' States to Ratify Statute of International Criminal Court, U.N. Press Release SG/SM/6686 (Sept. 1, 1998) (calling for the global community to sign the Rome Statute of the International Court of Justice); cf Joseph Lelyveld, *The Defendant*, NEW YORKER, May 27, 2002, at 82, 87 ("The total of sixty-six ratifying nations included America's closest allies . . . [but the] holdouts include Russia, China, and the 'axis of evil': Iran, Iraq, and North Korea.").

9. See U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *Rome Statute of the International Criminal Court*, U.N. DOC. A/CONF/183/9 (July 17, 1998), reprinted in 37 INT'L L. MATERIALS 999, 1002 (1998).

10. See *id.*

11. Antonio Cassese, *On the Current Trends towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law*, 9 EUR. J. INT'L L. 2, 13 (1998).

12. *Id.* at 13–14.

The ability of the ICCTs to secure custody of those indicted has generated much anecdotal debate revolving around power, interests, and norms.¹³ Despite the solid legal underpinnings of the ICCTs' enforcement regime, the ICCTs largely fail to procure tangible results due to their delusive persistence in rejecting the factoring of politics into the equation. While politics, including its interference with international judicial institutions, cannot be sanctified, it remains an inextricable element of the international system.¹⁴ This by no means offers a normative but rather a pragmatic interpretation indicative of the way international law, institutions, and international society have been operating through time.

Whether politics is the solution, the problem, or perhaps both, requires a metaphysical and ontological evaluation of the field. Whichever option one decides to adopt, however, one thing is certain: the involvement of politics in international law is very much present and indubitable.¹⁵ Normative approaches are certainly scholastically relevant and significant. But such endeavors neglect the practical utility of acknowledging certain systemic features of international law and international relations. Inasmuch as this may seem to be a less bold or alluring exercise, the field of international criminal law enforcement requires imminent results.¹⁶ This is not to say that the relevance and potential of the more normative discussion ought to be discounted, but rather, that both enterprises are equally important each on its own merit. For this reason, I suggest a perspective of the arrest and surrender enforcement that not only recognizes the relevance of international politics in its sphere but also capitalizes on it. I argue that by fully comprehending its enforcement tools, making use of its political role, and the realities surrounding it, the International Criminal Court ("ICC") may increase its rates in the apprehension of suspects, and secure higher levels of judicial enforcement.

More specifically, this Article uncovers the unused potential of the ICC and particularly the OTP that can be directed towards increasing and facilitating arrests. I utilize the three main analytical approaches from international relations theory—realism, liberalism, and constructivism—to construct a framework within which the Office of the Prosecutor of the ICC ("OTP") can perceive itself as a political actor and utilize its leverage with the international community. Instead of seeing these approaches as mutu-

13. JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* 116 (2005) (concluding that state compliance with the ICTY was procured by American power); Carla Del Ponte, Chief Prosecutor of the ICTY, Address at the Policy Briefing, European Policy Centre, Brussels (July 3, 2007), <http://www.icty.org/sid/8858> (suggesting that the arrests are owed to European Union conditionality); Harold Hongju Koh, Legal Advisor, U.S. Dept. of State, Special Briefing: U.S. Engagement with the International Criminal Court and the Outcome of the Recently Concluded Review Conference (June 15, 2010), http://www.state.gov/j/gcj/us_releases/remarks/2010/143178.htm [hereinafter *U.S. Engagement*] (arguing in favor of a transnational legal process).

14. See Cassese, *supra* note 11, at 17.

15. *Id.*

16. Nadia Banteka, *An Integrative Model for the ICC's Enforcement of Arrest and Surrender Requests: Toward a More Political Court?*, in *CONTEMPORARY ISSUES FACING THE INTERNATIONAL CRIMINAL COURT* 453, 457 (Richard H. Steinberg ed., 2016).

ally exclusive approaches, I use them as different sets of lenses that can shed light on distinct angles of the same issue with diverse conclusions. Transcending this realism-idealism dichotomy allows us to look at the different levels of the enforcement problem through varied analytical tools. I hypothesize that the OTP can improve compliance with ICC arrest warrants by making use of third-party states and non-state actors. I define third-party states, or third states, as all other states except for the situation state that is the one with the direct obligation to comply with the ICC arrest warrant either through the Rome Statute or a United Nations Security Council ("UNSC") Chapter VII Resolution.

Part I of this Article critically introduces the enforcement architectures and realities of the International Criminal Tribunal for the Former Yugoslavia ("ICTY") and the International Criminal Court.¹⁷ This juxtaposition delineates the importance of political realities in the apprehension of suspects. Part II discusses the ICC's bargaining leverage with third states as well as the potential relationship it can develop with them. After distinguishing between unwilling and unable situation states, I address the way third states may assist the OTP in the arrest and surrender process of unwilling states through inducements, reputational sanctions, and support for enforcement agencies. I argue that the OTP should embrace its political role and, grounded in law and evidence, take political realities into account but also use them to its advantage. The OTP can thus identify and use overlapping interests with third states or activist states in the field of human rights and international justice through increasing its political and diplomatic capabilities with the establishment of a diplomatic arm within its office. Finally, in Part III, I focus on the instances where civil society has the ability to influence third states or situation states to assist in the execution of arrest warrants. I argue that the OTP ought to address different actors within the global civil society such as NGOs, transnational networks, and individuals, simultaneously during its bargaining efforts, and benefit from existing networks of transnational actors that support the ICC.

I. Enforcement of International Criminal Law

ICCTs have been established on a belying enforcement paradox between their significant mandate and their inherent lack of enforcement powers.¹⁸ This endogenous frailty lies on the predicament that, unlike their national counterparts, they are not backed by systemic law enforcement.¹⁹ Instead, ICCTs are left to rely on external forces to procure enforcement.²⁰ Yet these "giants without arms and legs"²¹ preside over situations and crimes far more onerous to investigate and adjudicate than

17. Created pursuant to the Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

18. Mirjan Damaska, *The International Criminal Court Between Aspiration and Achievement*, 14 UCLA J. INT'L L. & FOREIGN AFF. 19, 19 (2009).

19. *Id.* at 21.

20. *Id.*

standard domestic law offenses.²²

A. The Enforcement Regime in the International Criminal Tribunal for the Former Yugoslavia

From the moment of its inception, the most pressing challenge the ICTY faced was the timely apprehension of suspects.²³ At Nuremberg, the remaining instigators of Hitler's *Endlösung* were captured and ceded by the Allied Forces.²⁴ But the ICTY began its mission with no defendants in custody, entirely dependent on the cooperation of recalcitrant states,²⁵ and without the ability to hold trials *in absentia*.²⁶ Among the complaints regularly aired in the United Nations General Assembly ("UNGA") during the ICTY Annual Report speeches was the Tribunal's reliance on state cooperation as the primary means of apprehending indictees.²⁷ Emphasis was further added on the need for more arrests of political and military leaders, who were still at large and posed a fundamental risk of impunity.²⁸

Indeed, the apprehension of indictees for international criminal courts is perhaps an even more fundamental problem than that of mere enforcement. The inability to bring suspects to custody threatens to undermine the entire construction of the international criminal justice constellation and a large part of the human rights regime.²⁹ Despite the initial pessimism regarding the prospects for apprehending its suspects,³⁰ the ICTY, under a perpetually prolonged life span, has managed to gain custody of all those indicted that remained alive through the course of time.³¹ But looking at the *realpolitik* surrounding the Tribunal, it was, in large part, the assistance from the European Union ("EU") and the United States that proved to be key factors in establishing both custody of the suspects and the accumulation of evidence.³² Despite the backing of the UNSC towards

21. See Cassese *supra* note 11, at 13, 14 ("Notwithstanding this development, the ICTY remains very much like a giant without arms and legs—it needs artificial limbs to walk and work. And these artificial limbs are state authorities. If the cooperation of states is not forthcoming, the ICTY cannot fulfill its functions. It has no means at its disposal to force states to cooperate with it.").

22. *Id.* at 11–13.

23. Hazel Fox, *An International Tribunal for War Crimes: Will the UN Succeed Where Nuremberg Failed?*, 49 *WORLD TODAY* 194, 196 (1993).

24. *Id.*

25. *Id.*

26. *Id.*

27. Cassese, *supra* note 11, at 10.

28. *Id.*

29. Steven D. Roper & Lilian A. Barria, *State Co-Operation and International Criminal Court Bargaining Influence in the Arrest and the Surrender of Suspects*, 21 *LEIDEN J. INT'L L.* 457, 458 (2008).

30. Illustrative of this pessimism was Michael Scharf's quote from the ICTY's first chief prosecutor Richard Goldstone, who lamented, "perhaps the real yardstick for assessing the success of the [ICTY], is whether it leads to the establishment of a permanent international criminal court." MICHAEL P. SCHARF, *BALKAN JUSTICE: THE STORY BEHIND THE FIRST INTERNATIONAL WAR CRIMES TRIAL SINCE NUREMBERG* 228 (1997).

31. *The Fugitives*, INT'L CRIM. TRIB. FOR FORMER YUGOSLAVIA, <http://www.icty.org/en/about/office-of-the-prosecutor/the-fugitives> (last visited Sept. 24, 2016).

32. Roper & Barria, *supra* note 29, at 460–61.

the ICTY by virtue of its establishment, and the multiple UNSC Resolutions calling for state cooperation in apprehensions of suspects, it was the eventual cooperation of the key actors and external pressure that, according to many, triggered arrests.³³ It is the relevance of such processes as the United States and EU bargaining game with the states of the former Yugoslavia that may shed some different light on the process of creating a more effective arrest and surrender regime in ICCTs.³⁴ But as valuable as the lessons from the ICTY may be, we ought to view them critically as linking economic and political pressure to procure arrests evolved through an uneasy path for more than a decade.

B. The Enforcement Regime in the International Criminal Court

The founding of the ICC marked a fundamental turning point in the pursuit of international criminal justice.³⁵ But similar to the ICTY, the ICC must also rely on state cooperation and judicial assistance in arrests and surrenders.³⁶ The Rome Statute in its comprehensive enforcement architecture sets out in Article 86 the general obligation to cooperate with the Court.³⁷ Article 87(7) provides that failure by a state party to comply with a request to cooperate shall allow the Court³⁸ to refer the matter to the Assembly of State Parties ("ASP") or the UNSC for enforcement measures.³⁹ Article 89(1) spells out the obligation to comply with the Court when a state party receives a request for arrest and surrender of an indicted individual located in its territory.⁴⁰ Nevertheless, these provisions are to be understood as equally reflecting a set of corollary facts: (1) the

33. *Id.*

34. The desire of the States that emerged out of the disintegration of FRY to join the EU facilitated the key role of the EU in exerting outside pressure by conditioning admission to the Union on cooperation of the successor states with the Court. The ICTY Prosecutor was requested by the Union to advise it on the question of whether state cooperation was satisfactory. In 2007, in a briefing to the External Relations Council of the Union, the ICTY Prosecutor conceded that without the pressure exerted by the EU and its member states, her "mandate would be an impossible mission." Carla Del Ponte, Chief Prosecutor of the ICTY, Briefing of the General Affairs & External Relations Council of the European Union (Oct. 15, 2007).

35. The symbolic moment of a former head of state standing trial in an ICTY courtroom as the Rome Statute entered into force on July 1, 2002 did not go unnoticed by international relations or international legal scholars. E.g., RACHEL KERR, *THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA: AN EXERCISE IN LAW, POLITICS AND DIPLOMACY* (2004) (describing scenes from the opening of the Milošević trial).

36. Roper & Barria, *supra* note 29, at 465.

37. Rome Statute, *supra* note 17, art. 86.

38. Goran Sluiter, *The Surrender of War Criminals to the International Criminal Court*, 25 LOY. L.A. INT'L & COMP. L. REV. 605, 614 (2003).

39. See Alain Pellet, *Settlement of Disputes*, in 2 *THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY* 1841, 1843 (Antonia Cassese et al. eds., 2002). Pellet states that article 119, when read in conjunction with article 87(7), "empowers the court to make findings on all questions relating to cooperation."

40. See Rome Statute, *supra* note 17, art. 89(1). Article 91(3) outlines the kind of written material that must accompany the request for arrest and surrender. See also C. Krebs & K. Prost, *Article 89: Surrenders of Persons to the Court*, in *COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS' NOTES, ARTICLE BY ARTICLE* 1071, 1073 (Otto Triffterer ed., 1999); Han-Ru Zhou, *The Enforcement of Arrest War-*

Court has no power to compel state compliance with its requests,⁴¹ and (2) the Court is unable to directly sanction states for lack of compliance.⁴² Rather, it has to take the long and indirect way via the ASP and the UNSC, and even then with unlikely tangible results.⁴³ This elaborate set of guidelines embodied in the Rome Statute paradoxically both weakens and strengthens the Court.⁴⁴ But at the end of the day, the success or failure of the ICC will depend, in great part, on its enforcement system as encapsulated in the Rome Statute.⁴⁵ This, in practice, means that similar to the ICCTs that preceded it, the success of the ICC will depend on state cooperation and compliance regarding the arrest and surrender of suspects.⁴⁶ The question that lingers, thus, is how the ICC will reverse the strenuous legacy of the ICCTs that came before it, and the negative prophecies proclaiming that “[it] is unlikely to punish the Husseins and future Miloševićs of the world because it is unlikely to get a grip on them.”⁴⁷

II. Towards a Different ICC Cooperation Model

The case of the ICTY reflects the political difficulties lodged in the international criminal justice turf, where state and judicial interests stray in different directions.⁴⁸ This becomes especially salient considering the inherent desire of those participating in international criminal justice to establish a process that is based solely on law, transcending elements of *realpolitik* that may otherwise emerge. The case of the ICTY illustrates the relevance of state interests and politics in steering state action.⁴⁹ Despite his relatively pessimistic view of a self-defeating ICC, Goldsmith puts forth a fair point in arguing that the ICTY example epitomizes the importance of power politics to international criminal justice.⁵⁰ For Goldsmith, the

rants by International Forces: From the ICTY to the ICC, 4 J. INT'L CRIM. JUST. 202, 211-12 (2006).

41. Leila Nadya Sadat & S. Richard Carden, *The New International Criminal Court: An Uneasy Revolution*, 88 GEO. L.J. 381, 415-16 (2000).

42. *Id.* at 416.

43. *Id.*

44. See Goran Sluiter, *The Surrender of War Criminals to the International Criminal Court*, 25 LOYOLA L.A. INT'L & COMP. L. REV. 605, 650 (2002) (Sluiter argues that “[t]he ad hoc tribunals were established with limited mandate. As a result of their swift creation, the Tribunals, especially the judges themselves, created much of the law On the other hand, the establishment of the ICC by treaty triggered protracted rounds of negotiations, which soon revealed that participating states were not prepared to have the institution shape its own laws in any way. Since the shaping of the legal assistance regime was left to the participating states, the resulting compromise left the system significantly weaker on a number of points”).

45. Jackson N. Maogoto, *A Giant without Limbs: The International Criminal Court's State-Centric Cooperation Regime*, 23 U. QUEENSLAND L.J. 102, 105 (2004).

46. *Id.*

47. Jack Goldsmith, *The Self-Defeating International Criminal Court*, 70 U. CHI. L. REV. 89, 92 (2003).

48. *Id.* at 92-93.

49. Christopher Rudolph, *Constructing an Atrocities Regime: The Politics of War Crimes Tribunals*, 55 INT'L ORG. 655, 660 (2001).

50. Goldsmith, *supra* note 47, at 93.

absence of the United States in the ICC serves as a catalyst for his sibylline pronouncement of the Court's lukewarm success rate.⁵¹ Such prediction carried considerable merit during the days when the U.S. foreign policy toward the ICC saw any engagement with the Court as a repulsive derogation from its sovereignty.⁵² But recent developments in U.S. foreign policy⁵³ on the ICC allow space for further cerebration on possible engagements despite the United States being a non-party to the Rome Statute. The same goes for other state and non-state parties that inadvertently become part of the arrest and surrender system simply due to their position in the international community.

While the world may not be conceived entirely—or at all—as a “Machiavellian Utopia,”⁵⁴ the importance and relevance of politics and interests may not be undermined in the enforcement of arrest and surrender requests. I argue that the ICC ought to manipulate this longstanding link

51. *Id.* Such importance can naturally bring forth both positive and negative results dependent on how it is utilized. The case of the ICC illustrates the tension between the need for great power support and the desire to establish a hard law regime that transcends power and political interests, a tension anticipated prior to the establishment of the Court. See Michael Scharf & Valerie Epps, *The International Trial of the Century? A “Cross-Fire” Exchange on the First Case Before the Yugoslavia War Crimes Tribunal*, 29 CORNELL INT’L L.J. 635, 660 (1997).

52. Adrian Jones, *Continental Divide and the Politics of Complex Sovereignty: Canada, The United States and the International Criminal Court*, 39 CANADIAN J. POL. SCI. 227, 238 (2006).

53. Most notably:

May 24, 2010: President Obama signs into law the Lord’s Resistance Army Disarmament and Northern Uganda Recovery Act of 2009. In his signing statement, he recognizes the ICC’s role in dealing with Lord’s Resistance Army (LRA) atrocities and states that [U.S.] policy supports bringing the LRA leadership to justice.

May 27, 2010: President Obama issues the [U.S.] National Security Strategy which affirms that “we are engaging with State Parties to the Rome Statute on issues of concern and are supporting the ICC’s prosecution of those cases that advance U.S. interests and values, consistent with the requirements of U.S. law.”

May 31–June 11, 2010: The [United States] participates in the Review Conference of the Rome Statute of the ICC in Kampala, Uganda. Following the conference, Legal Adviser Koh tells reporters, “After 12 years, I think we have reset the default on the U.S. relationship with the court from hostility to positive engagement.”

...

November 24, 2010: President Obama calls for leaders of the Lord’s Resistance Army, wanted by the ICC for alleged atrocities in Uganda to be brought to justice in order to create a lasting peace.

...

February 26, 2011: The [United States] co-sponsors and votes in favor of Resolution 1970, adopted unanimously by the UN Security Council, referring the situation in Libya to the ICC.

Chronology of U.S. Actions Related to the International Criminal Court, AM. NON-GOVERNMENTAL ORG. COAL. FOR ICC, <http://www.amicc.org/docs/US%20Chronology.pdf> (last visited Apr. 28, 2012) (providing a chronograph of the gradual shift in U.S. policy towards the ICC).

54. See Hans J. Morgenthau, *The Machiavellian Utopia*, 55 ETHICS 145, 147 (1945).

between state sovereignty and *realpolitik*⁵⁵ to its advantage. This *sui generis* relationship between the ICC and *realpolitik* denotes a reality that Cassese first identified and which is incessantly being ignored: while judicial enforcement must be the center stage of international criminal law, it must run parallel to political action.⁵⁶ “When it comes to the arrest and surrender of suspects, the Court is and ought to be as much of a political actor as a legal one.”⁵⁷ The Court may in turn spearhead such political action within its equal role as a political actor and a legal one. Part of this role is the challenge for the ICC to successfully convince skeptical states of there being a way to engage with the Court that does not result in an attrition of their sovereignty but in its enrichment. In achieving this goal, the Court’s potential use of the surrounding political realities may serve as an ace up its sleeve.

A. Embrace the Political Game

The Chief Prosecutor of the ICC, Ms. Fatou Bensouda, announced not long after she took office that the Court would not play the political game, which is to be left with the UNSC.⁵⁸ This reflects the general reluctance of the OTP to engage in political action and diplomacy. It also presents a difficult path to traverse, where the Court “sits uneasily at the dangerous intersection of law and politics.”⁵⁹ But why is this intersection a dangerous one? Our legal sensors are trained to view Courts as impartial institutions that apply the law removed from any political considerations or affiliations, independent from political institutions and processes.⁶⁰ And indeed this is the case. Even for the OTP, the Rome Statute provides in Article 42 that the OTP “shall act independently as a separate organ of the Court” and that members of the OTP “shall not seek or act on instructions from any external source.”⁶¹ During one of her early speeches, the Chief Prosecutor stated, “independence is the most fundamental component of our legitimacy and work”⁶² and “in selecting cases the OTP cannot yield to political considerations or adapt its work according to the peace negotiations timetable. It must always conduct its work on the basis of the law and of the evidence collected, and act accordingly, in an independent manner.”⁶³ Does the letter of Article 42, which prohibits acting on instructions from

55. Robert Cryer, *International Criminal Law vs. State Sovereignty: Another Round?*, 16 EUR. J. INT’L L. 979, 980 (2005).

56. Cassese, *supra* note 11.

57. William W. Burke-White, *Bargaining for Arrests at the International Criminal Court: A Response to Roper and Barria*, 21 LEIDEN J. INT’L L. 477, 482 (2008).

58. Interview by Till Papenfuss with Fatou Bensouda, Chief Prosecutor, International Criminal Court (Nov. 15, 2012), <https://theglobalobservatory.org/2012/11/interview-with-fatou-bensouda-chief-prosecutor-international-criminal-court/>.

59. T. Lindberg, *A Way Forward with the International Criminal Court*, 159 POL’Y REV. 15, 15 (2010).

60. *Id.* at 16.

61. Rome Statute, *supra* note 17, art. 42.

62. Fatou Bensouda, *Reflections From the International Criminal Court Prosecutor*, 45 W. RESERVE J. INT’L L. 505, 507 (2012).

63. *Id.*

external sources,⁶⁴ presuppose that case selection and ultimately the issuing of arrest warrants cannot be influenced by consideration of external parties, or the degree of cooperation to be expected?⁶⁵

This narrower perception of the functioning of the Court has presented a yardstick for the ICC so far.⁶⁶ As an actor within the international landscape, the ICC makes many decisions that are inevitably political.⁶⁷ To claim that they are not reflects an insulated reality that bears the risk of weakening the Court. Even though the ICC's purely judicial organs ought to be fully independent, the OTP and its arrest and surrender mechanisms are in fact dependent on the cooperation of states.⁶⁸ This is not to suggest the extreme that is often raised about how the Court will become a puppet of states, or only act if their political interests and support are involved.⁶⁹ The Court can neither act merely out of political calculation, nor without consideration of the law. Yet, grounded in law and evidence, the relevant organs of the Court have to consciously and openly take into account the political realities that exist in the arrest and surrender system as well as employ political, tactical, and strategic means and maneuvers to use them to their advantage.⁷⁰

First, the OTP enjoys prosecutorial discretion, that is, the power to choose if and which investigations to launch, if and which charges to bring, and who to charge with which crimes.⁷¹ In its exercise of such discretion, the OTP takes the existing political situations into account. For instance, prosecutorial discretion requires that the decision to select situations and cases be correlated to society's interest in exacting criminal punishment.⁷² International crimes are often committed by highly ranked officials and

64. James A. Goldston, *More Candour About Criteria: The Exercise of Discretion by the Prosecutor of the International Criminal Court*, 8 J. INT'L CRIM. JUST. 383, 396 (2010).

65. See also Office of the Prosecutor, ICC, *Policy Paper on Case Selection and Prioritisation* 6 (Draft 2016), https://www.icc-cpi.int/iccdocs/otp/29.02.16_Draft_Policy-Paper-on-Case-Selection-and-Prioritisation_ENG.pdf [hereinafter *OTP Policy Paper*].

66. Louise Arbour, *The Need for an Independent and Effective Prosecutor in the Permanent International Criminal Court*, 17 WINDSOR Y.B. ACCESS TO JUST. 207, 217–19 (1999).

67. This position is supported by a variety of scholars. See Matthew R. Brubacher, *Prosecutorial Discretion Within the International Criminal Court*, 2 J. INT'L CRIM. JUST. 71, 74 (2004); Alexander K.A. Greenawalt, *Justice Without Politics?: Prosecutorial Discretion and the International Criminal Court*, 39 N.Y.U. J. INT'L L. & POL. 583, 586–88 (2007); Sarah M.H. Nouwen & Wouter G. Werner, *Doing Justice to the Political: The International Criminal Court in Uganda and Sudan*, 21 EUR. J. INT'L L. 941, 946 (2010); Robert D. Sloane, *The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law*, 43 STAN. J. INT'L L. 39, 50 (2007).

68. Arbour, *supra* note 66, at 217.

69. *Id.* at 218–19.

70. James A. Goldston expresses the matter as follows: "To date, few have sought to describe the Prosecutor's discretionary function as it is: grounded in law and evidence, but, of necessity, taking into account broader considerations of strategy and policy, even while refraining from 'politics' in the sense of partisanship and/or bias for or against any interest external to the Court." Goldston, *supra* note 64, at 387.

71. See also *OTP Policy Paper*, *supra* note 65, at 11.

72. See OFFICE OF THE PROSECUTOR, ICC, *POLICY PAPER ON THE INTERESTS OF JUSTICE* 6–7 (2007), <https://www.icc-cpi.int/NR/rdonlyres/772C95C9-F54D-4321-BF09-73422BB23528/143640/ICCOTPIinterestsOfJustice.pdf>.

the OTP has to act almost on behalf of an international community of over 100 states.⁷³ Considering the societal interests of people on the ground but also of their states, the OTP's decisions cannot but penetrate the fabric of international politics.⁷⁴ What is more, when charging a suspect, the Court has to take into account factors beyond the mere gravity of the crimes involved and the interest of the international community. In the charging of Thomas Lubanga Dyilo, the OTP stated that an arrest warrant should be issued because of his imminent release from prison in the Democratic Republic of the Congo ("DRC").⁷⁵ The timing and decision to charge Lubanga were made with the intention of giving the ICC time to secure custody of him.⁷⁶ This not only made sense in terms of timing but also within the broader political context, as the ICC had to prove its practical viability by issuing a first arrest warrant in the DRC that was fairly easy to execute.⁷⁷

The OTP can also issue arrest warrants publicly or under seal. A sealed arrest warrant has the advantage that the indictee is not aware of its existence and would not restrict his or her movement. This could make domestic apprehensions easier if used strategically⁷⁸ given that the indictee could travel unknowingly to a state that is willing to execute the warrant.⁷⁹ Public arrest warrants, in contrast, draw the attention of the entire international community to the indictee.⁸⁰ Some indictees have even used public arrest warrants in rhetoric suggesting that the actual purpose of the ICC is regime change, as illustrated in the case of Al-Bashir.⁸¹ Therefore, next to the original decision of issuing an arrest warrant, the manner in which it is issued involves further important political considerations.

Despite the confidentiality of OTP decision-making, these examples illustrate that it engages in a process that operates within the general political environment without applying the law in a social and political vacuum.⁸² The OTP can acknowledge similar considerations and map them out in its prosecutorial strategy. The argument that the prospect for arrest and surrender is a factor that should be weighed against issuing an arrest warrant is not new, nor is it foreign in practice.⁸³ If the OTP officially

73. Goldston, *supra* note 64, at 389.

74. *Id.*

75. OFFICE OF THE PROSECUTOR, ICC, REPORT ON ACTIVITIES PERFORMED DURING THE FIRST THREE YEARS (JUNE 2003-JUNE 2006) (2006), http://www.iccnw.org/documents/3YearReport%20_06Sep14.pdf.

76. Goldston, *supra* note 64, at 394-95.

77. *Id.* at 402.

78. Christopher Gosnell, *The Request for an Arrest Warrant in Al Bashir: Idealistic Posturing or Calculated Plan?*, 6 J. INT'L CRIM. JUST. 841, 841-42 (2008).

79. *Id.* at 842.

80. *Id.* at 845.

81. *Id.*

82. See collected works *supra* note 68.

83. Morten Bergsmo, Catherine Cisse & Christopher Staker, *The Prosecutors of the International Tribunals: The Cases of the Nuremberg and Tokyo Tribunals, the ICTY and ICTR, and the ICC Compared*, in THE PROSECUTOR OF A PERMANENT INTERNATIONAL CRIMINAL COURT 121, 135 (Louise Arbour et al. eds., 2000).

acknowledged such strategies, it would not only increase its transparency and credibility, but also allow it to openly take into account overlapping interests of third actors in the arrest and surrender of indictees.⁸⁴ After all, an idealistic Court without people to put on trial cannot do much to serve international justice; yet, a pragmatic Court that recognizes political realities and capitalizes on them can make a difference. The OTP can achieve this by further distinguishing itself from the other core judicial organs of the Court that ought to indeed refrain from any political considerations and instead juxtapose, acknowledge, and embrace its political role.

B. The Role of the Office of the Prosecutor

A judicial institution such as the ICC that aspires to be permanent in its jurisdiction and global in its scope requires almost universal membership in order to achieve expedient and full enforcement. Considering that the ICC is still in its nascent years, such a goal would perhaps be over-achieving, despite the Court's success in acquiring new acceding states and strategic partners.⁸⁵ In order to satisfy its broad and difficult mandate, the ICC must expand its number of state parties, deepen the support it receives from the states that have already accepted its jurisdiction, and engage in productive dialogue and cooperation with those states that remain skeptical towards it. Therein lies the biggest opportunity to achieve the critical international support necessary for eliciting cooperation regarding enforcement and to increase the levels of global legitimacy that the Court enjoys.⁸⁶ The most important tool in this process is the role the prosecutor can play outside of the courtroom in wresting state cooperation.⁸⁷ Little has been discussed⁸⁸ about the dynamics and consequences of the prosecutor's actions in the convoluted international political terrain.⁸⁹

The prosecutor has considerable range of fluctuation based on the type of strategy she chooses to adopt in each situation. The two most identifiable ends of the prosecutorial strategy spectrum are that of a conciliatory approach on the one hand and a confrontational approach on the other.⁹⁰ But neither of those approaches alone represents a panacea in

84. Gosnell, *supra* note 78, at 845.

85. Greenawalt, *supra* note 67, at 584-85.

86. Victor Peskin, *Caution and Confrontation in the International Criminal Court's Pursuit of Accountability in Uganda and Sudan*, 31 HUM. RTS. Q. 655, 689 (2009).

87. *Id.* at 691.

88. Notable exceptions include: BENJAMIN N. SCHIFF, BUILDING THE INTERNATIONAL CRIMINAL COURT 194-247 (2008); Phil Clark, *Law, Politics and Pragmatism: The ICC and Case Selection in the Democratic Republic of Congo and Uganda*, in COURTING CONFLICT? JUSTICE, PEACE AND THE ICC IN AFRICA 37, 37-44 (Nicholas Waddell & Phil Clark eds., 2008); Alex de Waal, *Darfur, the Court, and Khartoum: The Politics of State Non-Cooperation*, in COURTING CONFLICT? JUSTICE, PEACE AND THE ICC IN AFRICA 29, 29-36 (Nicholas Waddell & Phil Clark eds., 2008); Roper & Barria, *supra* note 29; William A. Schabas, *Prosecutorial Discretion v. Judicial Activism at the International Criminal Court*, 6 J. INT'L CRIM. JUST. 731, 749-53 (2008).

89. Peskin, *supra* note 86, at 665.

90. *Id.* at 658, 661.

resolving the ICC's enforcement problem. Inasmuch as conciliation may be important to leverage some cooperation, its continued use when not followed by the necessary results bears the risk of generating a perception of a weak prosecutor conceded to state power.⁹¹ On the other hand, a more aggressive strategy against a particular state⁹² might help obtain cooperation through international pressure. It may also bring the opposite effect, complicating diplomatic efforts and igniting a defensive climate.⁹³ Power struggles beyond the courtroom among the prosecutor, the targeted states, and influential actors in the international community are certainly a reality that we cannot lightly discount.⁹⁴ But this represents a stage that comes prior to the judicial one. Key parties to this stage are the OTP as well as international actors such as the UN, the EU, and other regional organizations. All these different actors establish a coordination game requiring tools that can be made available to the prosecutor by moving even further towards a policy of positive engagement through indicating that a constructive relationship with the Court is in their immediate and best interests. Recognition of potentially complementary and overlapping interests among the actors involved presents the ultimate step in order to seal this cooperative relationship that may organically alter the current tepid landscape of international criminal law enforcement.

C. The International Criminal Court & Its Bargaining Power

Inasmuch as the spotlight has been focused on problems of enforcement in the form of a prisoner's dilemma game in international criminal law, little attention has been paid to the coordination game of the bargaining stage.⁹⁵ For terminological clarity, I understand bargaining situations to occur when all actors involved may gain from a cooperative deal yet disagree over the specifics of the proposed arrangement. Before states cooperate to enforce a commitment they have agreed to, they often bargain to decide how, when, and whether they will implement it.⁹⁶ Regardless of the substantive domain, problems of international cooperation typically involve first a bargaining stage (coordination game) and next an enforcement stage (prisoner's dilemma game or other).⁹⁷ In spite of their significant conceptual nuances, all theories of compliance recognize one common theme: bargaining is intrinsic to understanding and achieving coopera-

91. *Id.* at 658, 665.

92. See, e.g., Luis Moreno-Ocampo, Prosecutor of the International Criminal Court, Building a Future on Peace and Justice, Address at International Conference, in Nuremberg, Germany (June 25, 2007), https://www.icc-cpi.int/NR/rdonlyres/4E466EDB-2B38-4BAF-AF5F-005461711149/143825/LMO_nuremberg_20070625_English.pdf.

93. Peskin, *supra* note 86, at 665.

94. *Id.* at 660.

95. James Fearon, *Bargaining, Enforcement, and International Cooperation*, 52 INT'L ORG. 269, 269 (1998).

96. *Id.* at 270.

97. *Id.*

tion.⁹⁸ The ICC can therefore strengthen its enforcement regime through a clearer understanding and appreciation of how its bargaining tools may affect the arrest and surrender of suspects.⁹⁹

International Relations literature extensively covers the efficiency of external economic assistance or sanctions under a carrot and stick game to promote state cooperation.¹⁰⁰ As a result, some attention has been paid to the bargaining game between the ICC and the relevant state harboring indicted individuals, or between the ICC and the indicted individuals directly.¹⁰¹ Yet little reference has been made to the Court's bargaining leverage that can be used to attract key global actors in the regional and global political power play to affect arrest and surrender. This is likely due to the, oftentimes accurate, perception that those key actors appear vocally opposed to the ICC.¹⁰² But even actors with opposed preferences can reach a mutually beneficial deal if the outcome of disagreement is sufficiently unattractive, if their interests overlap, or if both factors were to occur.¹⁰³ For this reason, there are instances where the ICC, but also key regional and global actors, will incur some utility gain by bringing indictees to justice despite their other possible differing preferences.¹⁰⁴ If the ICC is unable to try a suspect, it cannot administer justice and thus risks its legitimacy within the international community.¹⁰⁵ Powerful global and regional actors on the other hand might have a direct interest in facilitating conflict solutions in situations that involve those indicted by the ICC.¹⁰⁶ While there may never be a perfect overlap between the two, that is to say global/regional actors may not always be interested in getting involved in all the situations pursued by the ICC, this by no means nullifies the utility to be gained by both parties when such an overlap is indeed identified and pursued.

The OTP, in order to establish the possible ways available to facilitate and increase arrests, needs to assess the means at its disposal. An important distinction to make is one between the cases where the situation state is unwilling to arrest the indicted individuals,¹⁰⁷ and the cases where the

98. See Jeffrey Checkel, *The Constructivist Turn in International Relations Theory*, 50 *WORLD POL.* 324, 334–35 (1998). See generally KENNETH OYE, *COOPERATION UNDER ANARCHY* (1986).

99. Kenneth Abbott et al., *The Concept of Legalization*, 54 *INT'L ORG.* 401, 416, 419 (2000).

100. The efficacy of economic sanctions is a highly contested issue whose review falls beyond the scope of the present paper.

101. E.H. Ritter & S. Wolford, *Bargaining and the Effectiveness of International Criminal Regimes*, 24 *J. THEORETICAL POL.* 149, 149–51 (2012).

102. See *id.* at 149.

103. For general treatments of bargaining models, see ABHINAV MUTHOO, *BARGAINING THEORY WITH APPLICATIONS* 2–3 (1999); James Fearon, *Rationalist Explanations for War*, *INT'L ORG.* 379, 385–86 (1995); and Ariel Rubinstein, *Perfect Equilibrium in a Bargaining Model*, 50 *ECONOMETRICA* 97, 97–109 (1982).

104. See Ritter & Wolford, *supra* note 101, at 151.

105. *Id.* at 149–52.

106. *Id.* at 151.

107. See *Prosecutor v. Sylvestre Mudacumura*, ICC-01/04-01/12, Decision on the Prosecutor's Application under Article 58 (July 13, 2013), <https://www.icc-cpi.int/Cour->

situation state—due to lack of infrastructure, effective governance, circumstances, or any other obstacle that does not impede the state's willingness—is unable to enforce the warrant.¹⁰⁸ So far, the OTP seems to handle most arrest and surrender attempts under similar approaches without deference to either the different circumstances or the political incentives of the different jurisdictional bases. Seeing as how the willingness of states to comply with ICC arrest warrants is closely connected to the basis of the Court's jurisdiction, the two situations are distinct and ought to be treated as such.

The ICC can exercise jurisdiction for the crimes that fall within the Rome Statute based on three grounds: (1) a self-referral by a state party; (2) the Prosecutor's independent *proprio motu* power; or (3) a UNSC referral.¹⁰⁹ The cases of unwilling situation states are more likely to occur in the instances of a UNSC referral or where the proceedings are initiated *proprio motu*. Situations such as those of Libya and Sudan exemplify this likely unwillingness of states to comply with the arrest warrants of the Court.¹¹⁰ Thus, situations of a UNSC referral are likely akin to the type of non-compliance that the ICTY faced as a tribunal set up by UNSC Resolution,¹¹¹ due to the unwillingness of states to comply with arrest warrants issued by a court whose jurisdiction is "forced upon them."¹¹² In this type of cases, external pressure in the form of positive or negative inducements may be more successful in exerting compliance with arrest warrants. In a similar tradition with inducements,¹¹³ condemnation and reputational

tRecords/CR2012_07502.pdf. See generally Prosecutor v. Sylvestre Mudacumura, ICC-01/04-01/12, Case Information Sheet (Feb. 24, 2016), <https://www.icc-cpi.int/iccdocs/PIDS/publications/MudacumuraEng.pdf>; Prosecutor v. Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09, Case Information Sheet (Mar. 26, 2015), <https://www.icc-cpi.int/darfur/albashir/Documents/AlBashirEng.pdf>; Prosecutor v. Abdel Raheem Muhammad Hussein, ICC-02/05-01/12, Case Information Sheet (Mar. 25, 2015), <https://www.icc-cpi.int/darfur/hussein/Documents/HusseinEng.pdf>; Prosecutor v. Ahmad Muhammad Harun and Ali Muhammad Ali Abd-Al-Rahman, ICC-02/05-01/07, Case Information Sheet (Mar. 25, 2015), <https://www.icc-cpi.int/darfur/harunkushayb/Documents/HarunKushaybEng.pdf>.

108. Prosecutor v. Joseph Kony and Vincent Otti, ICC-02/04-01/05, Case Information Sheet (Sept. 10, 2015), <https://www.icc-cpi.int/uganda/kony/Documents/KonyEtAlEng.pdf>. The proceedings against Raska Lukwiya were only terminated due to his death before he could be arrested. Raska Lukwiya, Case No. ICC-02/04-01/05, Decision to Terminate the Proceedings Against Raska Lukwiya (July 11, 2007), https://www.icc-cpi.int/CourtRecords/CR2007_03469.pdf.

109. Rome Statute, *supra* note 17, art. 13, 14, 15.

110. See Dapo Akande, *The Effect of Security Council Resolutions and Domestic Proceedings on State Obligations to Cooperate with the ICC*, 10 J. INT'L CRIM. JUST. 299, 305 (2010).

111. The ICTY was established by UN Security Council Resolution 827 using its mandate under Chapter VII of the UN Charter. See S.C. Res. 827, ¶ 2 (May 25, 1993).

112. Andrea K. Talentino, *Perceptions of Peacebuilding: The Dynamic of Imposer and Imposed Upon*, 8 INT'L STUD. PERSP. 152, 153 (2007).

113. See JACK DONELLY, REALISM AND INTERNATIONAL RELATIONS 18 (2000); Jon Elster, *Rationality, Morality and Collective Action*, 96 ETHICS 136, 139 (1985); Steen Scheuer, Presentation at Roskilde University 5th Conference of the International Association for Critical Realism: The Social Dimension of Rational Choice—a Critical and Realist View of Theories of Motivation and Agency at Work (Aug. 17-19, 2001).

damage¹¹⁴ towards non-compliant states may serve as auxiliary tools to increase compliance.

1. *Situation State Unwilling: Inducements & Reputational Sanctions*

In compliance theory, instrumentalist approaches are inspired by and find their place primarily in the realist tradition of international relations.¹¹⁵ In accordance with these approaches, the sole driving force of states, including in instances of compliance, is state interests.¹¹⁶ States only comply with international norms and rules when it is in line with their interests to do so, and are willing to abandon their international law obligations if they have an overriding interest.¹¹⁷ This is the primary interpretative lens used to understand the initial bad record of compliance with arrest warrants issued by the ICTY. The ICTY has undergone two distinct periods regarding its capability to apprehend suspects. During its first period of operation until the end of the 1990s, it was particularly ineffective in procuring state cooperation despite a Chapter VII UNSC Resolution¹¹⁸ calling for full cooperation, including the arrest and surrender of suspected individuals.¹¹⁹ In the case of former Yugoslavia, neither the states in question nor their population considered it in their interest to

114. Andrew T. Guzman, *A Compliance Based Theory of International Law*, 90 CAL. L. REV. 1822, 1838-39 (2002).

115. *Id.*

116. JOHN M. HOBSON, *THE STATE AND INTERNATIONAL RELATIONS* 60 (2000); Anne L. Herbert, *Cooperation in International Relations: A Comparison of Keohane, Haas and Franck*, 14 BERKELEY J. INT'L L. 221, 226 (1996); Robert O. Keohane, *International Relations and International Law: Two Topics*, 38 HARV. INT'L L.J. 487, 487-88 (1997); Onuma Yasuaki, *International Law in and with International Politics: The Functions of International Law in International Society*, 14 EUR. J. INT'L L. 105, 126-28 (2003).

117. DAVID ARMSTRONG ET AL., *INTERNATIONAL LAW AND INTERNATIONAL RELATIONS* 78 (2012).

118. S.C. Res. 827, ¶ 4 (May 25, 1993) ("[The Council] [d]ecides that all States shall cooperate fully with the International Tribunal and its organs in accordance with the present resolution and the Statute of the International Tribunal and that consequently all States shall take any measures necessary under their domestic law to implement the provisions of the present resolution and the Statute, including the obligation of States to comply with requests for assistance or orders issued by a Trial Chamber under Article 29 of the Statute"). *But see* RACHEL KERR, *THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA: AN EXERCISE IN LAW, POLITICS, AND DIPLOMACY* 38 (Oxford Univ. Press 2004) ("Beyond condemnation, nothing concrete has been done by the Security Council to punish non-compliance."); Nancy Amoury Combs, *Copping a Plea to Genocide: the Plea Bargaining of International Crimes*, 151 U. PA. L. REV. 2, 67-68 (2002) (arguing that "[t]he President of the ICTY has made eleven reports to the Security Council regarding lack of state cooperation," all of which received statements that a certain country's actions are "deplorable"). The one possible exception to this issue of noncompliance is UNSC Resolution 1022. *See* S.C. Res. 1022 (Nov. 22, 1995). Prior to the creation of the ICTY, multiple economic sanctions had been placed on the Federal Republic of Yugoslavia (FRY). After the FRY signed the General Framework Agreement for Peace the sanctions were suspended. Resolution 1022 stated that if the FRY failed to meet its obligations under the agreement, however, the sanctions would go back into effect after five days. But when the FRY did not comply, even after multiple notices to the UNSC, the sanctions were not reinstated.

119. *See* Theodor Meron, *Answering for War Crimes: Lessons from the Balkans*, 76 FOREIGN AFF. 2, 2 (1997).

arrest what were viewed as “hometown-heroes” or people in their social circle or interest group.¹²⁰ In the instances where a state does not comply with its obligations due to contrary interests, the main way to enforce compliance under the realist lens is through coercive action by third states¹²¹ to achieve a shift of the interests of non-complying states towards compliance.

One of the tactics third states may employ to achieve this shift of interests are inducements, or what in other words resembles the “carrot” in a carrot and stick game. To induce Croatia’s compliance, the ICTY coordinated with the United States and the EU in a “push and pull” approach where positive and negative inducements were used interchangeably to yield the arrest of all Croatian indictees.¹²² The United States provided bilateral financial and military assistance with the promise of Croatia’s compliance (carrot),¹²³ while the European Council froze Croatia’s accession process after the ICTY Chief Prosecutor had issued a negative assessment of Croatian cooperation (stick).¹²⁴ These kinds of inducements may be either positive or negative.¹²⁵

Positive inducements usually take the form of assurances that a state is to receive if it complies with its obligations.¹²⁶ In the case of the ICTY, the initial stalemate regarding its arrests record was eventually broken.¹²⁷ During the 2000s in its second period, the ICTY saw a developing shift in state cooperation and a significant boost in its bargaining power, leading to the arrest and surrender of all 161 indictees.¹²⁸ This infallible compliance record was achieved, in large part, due to the substantial assistance of third states as well as International Organizations (“IOs”) and Regional Organizations, the most prominent of which were the United States and the EU.¹²⁹ Both the United States and the EU, realizing this divergence between the interests of the former Yugoslavian states and those of the ICTY, coupled the arrest and surrender of the indictees with assurances to grant considerable benefits to them.¹³⁰

First, the EU ensured the creation of a consistent and fixed link between arrest and surrender as well as the accession of Serbia and Croatia

120. See Patricia M. Wald, *Apprehending War Criminals: Does International Cooperation Work?*, 27 AM. U. INT’L L. REV. 229, 235 (2012).

121. Richard H. Steinberg, *Wanted Dead or Alive: Realism in International Law*, in INTERDISCIPLINARY PERSPECTIVES ON INTERNATIONAL LAW AND INTERNATIONAL RELATIONS: THE STATE OF THE ART 146, 163 (Jeffrey L. Dunoff & Mark A. Pollack eds., 2013).

122. CHRISTOPHER K. LAMONT, INTERNATIONAL CRIMINAL JUSTICE AND POLITICS OF COMPLIANCE 48-52 (2010).

123. *Id.* at 48-51.

124. *Id.* at 55.

125. Jana von Stein, *The Engines of Compliance*, in INTERDISCIPLINARY PERSPECTIVES ON INTERNATIONAL LAW AND INTERNATIONAL RELATIONS: THE STATE OF THE ART 477, 479 (Jeffrey L. Dunoff & Mark A. Pollack eds., 2013).

126. *Id.*

127. See LAMONT, *supra* note 122, at 83; *The Fugitives*, *supra* note 31.

128. See LAMONT, *supra* note 122; *The Fugitives*, *supra* note 31.

129. LAMONT, *supra* note 122, at 82-83, 85.

130. *Id.* at 82-85.

to the EU.¹³¹ In tandem, the United States exerted diplomatic pressure through pressuring the World Bank to grant development aid and supported Serbia's accession to NATO in order to achieve long-lasting peace dependent on cooperation.¹³² Some have argued that compliance with the ICTY was largely due to the "American Power."¹³³ Others, like the ICTY Chief Former Prosecutor Carla del Ponte, suggested that 90% of the ICTY arrests were achieved due to the EU's persistence on stalling the accession process of former Yugoslavian states before all indictees were arrested and surrendered to the Tribunal.¹³⁴ Paradigmatically, when Serbian officials failed to turn over the accused Mladic to the ICTY, the EU suspended the discussions concerning the "Stabilization and Association Agreement."¹³⁵ Within one month the Serbian authorities designed an "action plan" to actively support the efforts to arrest Mladic.¹³⁶ Under either tenable position, it was the positive inducements of third states that led to the arrest and surrender of individuals—either by linking the arrests with financial gains and development aid conditional upon cooperation, or through favorable trade agreements and institutional inclusion such as in the EU and NATO.¹³⁷

Negative inducements on the other hand usually take the form of threats or acts to the detriment of a state for its failure to comply with international law obligations.¹³⁸ The archetypal negative inducement is trade sanctions.¹³⁹ Nonetheless, trade sanctions and their effects have been heavily criticized,¹⁴⁰ in part for indiscriminately hindering the most vulnerable social groups and for having the potential to aggravate already dire post-conflict situations.¹⁴¹ Hufbauer, Schott, and Elliot have observed that sanctions only work in 25% of cases, and only under an extremely limited set of conditions.¹⁴² The reason for this is that "the evolution of the world economy since WWII has been a narrowing of the circumstances in which unilateral economic leverage may be effectively applied."¹⁴³ More particularly with regard to the goal of arrests, sanctions

131. *Id.*

132. *Id.*

133. GOLDSMITH & POSNER, *supra* note 13.

134. Address of Carla Del Ponte at The Policy Briefing, *supra* note 13.

135. Victor Peskin & Mieczysław P. Boduszyński, *Balancing International Justice in the Balkans: Surrogate Enforcers, Uncertain Transitions and the Road to Europe*, 5 INT'L J. TRANSITIONAL JUST. 52, 63 (2011).

136. Interview with Carla Del Ponte, Chief Prosecutor, and David Tolbert, Deputy Prosecutor, ICTY, in The Hague (July 12, 2006).

137. Alessandro Minuto Rizzo, NATO Deputy Secretary General, Keynote Speech at Diplomatic Academy, Belgrade (Dec. 19, 2006), <http://www.nato.int/docu/speech/2006/s061219a.htm>.

138. See DAVID A. BALDWIN, *ECONOMIC STATECRAFT* 20 (Princeton Univ. Press 1985).

139. *Id.* at 41–42.

140. See GARY CLYDE HUFBAUER ET AL., *ECONOMIC SANCTIONS RECONSIDERED: HISTORY AND CURRENT POLICY* 1, 71, 114 (Inst. for Int'l Econ. 1990).

141. See Robert A. Pape, *Why Economic Sanctions Do Not Work*, 22 INT'L. L. SEC. 90, 93, 107, 110 (1997).

142. See HUFBAUER, *supra* note 140, at 71.

143. *Id.* at 114.

are unlikely to facilitate them. In order for sanctions to be effective here, they would need to be backed by a near-total amount of states in a world where most major powers such as China and Russia have been opposed to them particularly regarding human rights violations or war crimes.¹⁴⁴ This, combined with their veto holding power in the UNSC, makes it unlikely that they would agree to a sanctioning regime, let alone implement one.

Other types of negative inducements may be more fitting for the purposes of the ICC arrest and surrender requests in the form of targeted, also known as “smart,” sanctions.¹⁴⁵ Measures targeted towards individuals such as travel bans or asset freezing may prove more effective.¹⁴⁶ For instance, in the case of Al-Bashir, third states diplomats sabotaged his anticipated visits by canceling, rescheduling, or relocating meetings thus putting a detriment to his ability to engage effectively in multilateral diplomacy.¹⁴⁷ The lack even of such negative inducements has proved problematic, as in the case of Al-Bashir’s unhindered traveling, which has caused not only a sense of inaction on the part of ICC member states but also cynicism towards the Court.¹⁴⁸ Travel bans may then prove effective in the

144. See Pape, *supra* note 141, at 106.

145. See C. Joy Gordon, *Smart Sanctions Revisited*, 25 ETHICS & INT’L AFF. 315, 315 (2011).

146. *Id.*

147. *UN Members: Oppose Al-Bashir’s Visit*, HUM. RTS. WATCH (Sept. 18, 2013, 6:51 AM), <https://www.hrw.org/news/2013/09/18/un-members-oppose-al-bashirs-visit>.

148. See *Prosecutor v. Al Bashir*, Case No. ICC-02/05-01/09-109, Decision informing the United Nations Security Council and the Assembly of the States Parties to the Rome Statute about President Omar Al-Bashir’s Recent Visit to the Republic of Chad (Aug. 27, 2010), https://www.icc-cpi.int/CourtRecords/CR2010_05769.pdf (noting that President Al Bashir recently visited Chad and Kenya); see also *Prosecutor v. Al Bashir*, Case No. ICC-02/05-01/09-132, Decision requesting observations about Omar Al-Bashir’s recent visit to the Republic of Chad, at 4, 5–6 (Aug. 18, 2011), https://www.icc-cpi.int/CourtRecords/CR2011_12351.pdf (describing the background of President Al-Bashir’s visits to Chad, explaining that he was there from August 7–8, 2011 to attend the inauguration ceremony for Idriss Deby, stating that there are allegations that President Al Bashir traveled to Chad twice without being arrested, and asking that Chad respond with an explanation for their failure to comply with the Rome Statute no later than September 9, 2011); *Prosecutor v. Al Bashir*, Case No. ICC-02/05-01/09-129, Decision informing the United Nations Security Council and the Assembly of States Parties to the Rome Statute about Omar Al-Bashir’s recent visit to Djibouti, at 3 (May 12, 2011), https://www.icc-cpi.int/CourtRecords/CR2011_05772.pdf (explaining that “according to the media information available, Omar Al Bashir had attended the inauguration ceremony of Djibouti’s President Ismael Omar Guelleh on May 8, 2011”); *Prosecutor v. Al Bashir*, Case No. ICC-02/05-01/09-119, Transmission of the reply from the Republic of Kenya, ¶¶ 1–4 (Oct. 29, 2010), https://www.icc-cpi.int/CourtRecords/CR2010_09219.pdf; Julian Borger, *Court Censures Commonwealth Chief as Rift Deepens over War Crimes Suspects: Sharma ‘Questions Duty’ of States to Hand Over to ICC: Row Began over Kenya Refusal to Arrest Bashir*, GUARDIAN, Oct. 28, 2010, at 22 (reporting that President Al Bashir caused an “uproar” by traveling to Kenya, an ICC signatory); Press Release, African Union, On the Decision of the Pre-Trial Chamber of the ICC Informing the UN Security Council and the Assembly of the State Parties to the Rome Statute about the Presence of President Omar Hassan Al Bashir of the Sudan in the Territories of the Republic of Chad and the Republic of Kenya (Aug. 29, 2010), [http://www.iccnw.org/documents/PRDecisionPretrialICCinformingUNSC_Al Bashir_29Aug2010_en.pdf](http://www.iccnw.org/documents/PRDecisionPretrialICCinformingUNSC_Al%20Bashir_29Aug2010_en.pdf) (argu-

short or long term as they may severely isolate the indicted governmental officials from the international community, possibly cap their re-election in situations where democracy or some sort of representative state of affairs has been restored, or force them to resign from power.¹⁴⁹

Asset freezes, on the other hand, refer to tracing and blocking funds of certain individuals or governments that are located in international banking institutions.¹⁵⁰ Asset freezing has been used before under UNSC Chapter VII Resolutions through the UNSC's authority to give effect to its decisions when necessary by engaging in economic interruption.¹⁵¹ The UNSC has also urged states to individually impose asset freezes against individuals as well as nations that aided individuals indicted by international courts and tribunals, particularly the ICTY.¹⁵² Asset freezes are unique in their ability to further isolate persons indicted by the ICC, to serve as an effective penalty even if such persons evade justice, and to force them to surrender themselves to the ICC.¹⁵³ They also have the ability to bypass most problems of UNSC multilateralism as these "sanctions would be targeted at specific individuals, not governments" and would thus "seem to be easier to gain support of the members of the Security Council," avoiding veto.¹⁵⁴ Asset freezes may prove to be a promising negative inducement in improving the enforcement record of ICC arrest warrants. Additionally, withdrawing a positive inducement through the suspension of financial support, development aid, or accession talks with regard to IOs and Regional Organizations may be an effective negative inducement as in the situation of the EU and Croatia regarding the ICTY.¹⁵⁵

Reputation is another factor identified as connected to compliance with international law.¹⁵⁶ Lack of compliance with international law may result in the reputational damage of the recalcitrant states.¹⁵⁷ This would in turn have the effect of other states becoming less willing to cooperate and enter in favorable agreements with the non-compliant state both due to

ing that as a neighbor of Sudan, it is important for Chad to engage Sudan to ensure peace and stability).

149. See David Cortright & George A. Lopez, *Targeted Sanctions: Lessons from the 1990s*, in SMART SANCTIONS: THE NEXT STEPS—THE DEBATE ON ARMS EMBARGOES AND TRAVEL SANCTIONS WITHIN THE 'BONN-BERLIN PROCESS' 19, 28–29, 35 (Michael Brzoska ed., 2001).

150. See *id.* at 26–27, 35.

151. U.N. Charter art. 41; see S.C. Res. 1503 (Aug. 28, 2003); see, e.g., S.C. Res. 1267, ¶ 4(b) (Oct. 15, 1999) (subsequently modified by S.C. Res. 1333 (2000), 1363 (2001), 1388 (2002), 1390 (2002), 1452 (2002), 1455 (2003), 1526 (2004), 1617 (2005), 1735 (2006)).

152. *Id.*

153. Michael P. Scharf, *The Tools for Enforcing International Criminal Justice in the New Millennium: Lessons from the Yugoslavia Tribunal*, 49 DEPAUL L. REV. 925, 945 (2000).

154. *Id.*

155. See, e.g., R. Jeffrey Smith, *Secret Meetings Foiled Karadzic Capture Plan*, WASH. POST, Apr. 23, 1998, at A32.

156. See, e.g., Guzman, *supra* note 114, at 1861–62; see also LOUIS HENKIN, *HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY* 52 (1979).

157. HENKIN, *supra* note 156, at 52; Guzman, *supra* note 114, at 1861–62.

possible condemnation of their international law violation as well as the lack of trust prompted by non-complying behavior.¹⁵⁸ Non-compliance may also have a reputational cross-effect.¹⁵⁹ Acts contrary to international law in one area such as non-compliance with ICC arrest warrants may have a negative effect on the state's overall reputation, decreasing the willingness of other states to engage in cooperative or diplomatic relations with that state in general.¹⁶⁰ Another way to interpret compliance with ICTY's arrest warrants is the former Yugoslavian states' intentions to engender a reputational shift and regain a good reputation through normalizing their standing within the international community and their accession to IOs and Regional Organizations.¹⁶¹

Rational choice theory and the workings of ICCTs are able to provide further insight on when inducements may be used most effectively. As a general matter, inducements ought to be applied until a tipping point is reached and passed, where the interest to disregard an arrest warrant is lesser than the interest to comply.¹⁶² From a rational choice analysis, the state's government acting with individual agency as a rational actor will cease non-compliance when its cost-benefit analysis indicates that compliance is more beneficial than non-compliance.¹⁶³ In addition, inducements are more effective when applied simultaneously by multiple actors such as third states, IOs, or Regional Organizations as the benefit or loss becomes more significant.¹⁶⁴ The Charles Taylor case also reinforces this point. Charles Taylor had enjoyed safe haven in Nigeria for three years between 2003 and 2006.¹⁶⁵ It wasn't until the coordinated efforts of the United Kingdom, United States, and Liberia, that capitalized on Nigeria's President Obasanjo's need for international support for reelection, debt relief, and a White House meeting, that led to Obasanjo's decision to surrender Taylor in March 2006.¹⁶⁶ The well-coordinated inducements by three states as well as the support of civil society managed to shift the interests of Nigeria and its President to bring about Taylor's arrest.¹⁶⁷

2. Situation State Willing but Unable

Another scenario involves states that are willing to arrest but lack the capacity to do so. This situation could emerge either after a self-referral or

158. See ANDREW T. GUZMAN, *HOW INTERNATIONAL LAW WORKS: A RATIONAL CHOICE THEORY* 33 (2008); Rachel Brewster, *Reputation in International Relations and International Law Theory*, in *INTERNATIONAL LAW AND INTERNATIONAL RELATIONS: THE STATE OF THE ART* 524, 527-28 (Jeffrey L. Dunoff & Mark A. Pollack eds., 2013).

159. See GUZMAN, *supra* note 158, at 100-06.

160. *Id.*

161. Brewster, *supra* note 158, at 528.

162. GUZMAN, *supra* note 158, at 33-41; Abram Chayes & Antonia H. Chayes, *On Compliance*, 47 INT'L ORG. 175, 203 (1993).

163. GUZMAN, *supra* note 158, at 33-41.

164. See, e.g., Richard Dicker, *Ramping Up Strategies for ICC Arrests: A Few Lessons Learned*, ICC FORUM, <http://iccforum.com/arrest> (last visited Sept. 10, 2016).

165. *Id.*

166. *Id.*

167. *Id.*

where the internal infrastructure of a state, including its law enforcement, intelligence, and judicial capabilities, are insufficient to successfully pursue the indictee.¹⁶⁸ To address this impasse, I argue that the Court ought to seek the help of third states and/or IOs or Regional Organizations to facilitate the enforcement of arrest warrants. The, albeit short, history of the ICC has brought forward a case selection strategy that was not initially considered and is not explicitly referred to in the Rome Statute. Even though Article 14 of the Rome Statute deals with referrals of a situation by a state party, the Court designers could hardly have expected that out of the nine situations under investigation by the Court, four would be self-referrals.¹⁶⁹ Most of these instances come from governments that have an interest to pursue certain individuals that usually belong to rebel groups fighting against them.¹⁷⁰ In the situation of Uganda for instance, the OTP struck a deal with the government to secure its cooperation with the promise of only prosecuting the insurgents and forego any government officials and military.¹⁷¹ The premise in this scenario, therefore, is that the government wants to arrest the indictees but does not have the means to do so.

Managerial theories in international relations assert that states generally seek to comply with their international obligations but at times fail to do so due to reasons of limited capacity.¹⁷² In order to induce compliance, efforts must be focused on building internal capacity and strengthening domestic institutions and administrative structures.¹⁷³ The example of Uganda further demonstrates one of these difficulties. Joseph Kony, the leader of the Lord's Resistance Army ("LRA") has been at large while the Uganda government has professed its inability to control certain parts of

168. See LAMONT, *supra* note 122, at 41, 83; Payam Akhavan, *The Lord's Resistance Army Case: Uganda's Submission of the First State Referral to the International Criminal Court*, 99 AMERICAN J. INT'L L. 403, 415; Chayes & Chayes, *On Compliance*, *supra* note 162, at 188, 193–94.

169. To date, four State Parties to the Rome Statute—Uganda, the Democratic Republic of the Congo, the Central African Republic, and Mali—have referred situations occurring on their territories to the Court. In addition, the Security Council has referred the situation in Darfur, Sudan, and the situation in Libya—both non-State Parties. On March 31, 2010, Pre-Trial Chamber II granted the Prosecution authorization to open an investigation *proprio motu* in the situation of Kenya. In addition, on October 3, 2011, Pre-Trial Chamber III granted the Prosecutor's request for authorization to open investigations *proprio motu* into the situation in Côte d'Ivoire. See *Situations under investigation*, INT'L CRIM. CT., <https://www.icc-cpi.int/pages/situations.aspx> (last visited Sep. 10, 2016).

170. See Phil Clark, *Chasing Cases: The ICC and Politics of State Referral in the Democratic Republic of the Congo and Uganda*, in *THE INTERNATIONAL CRIMINAL COURT AND COMPLEMENTARITY* 1180, 1186–87, 1197.

171. Clark, *supra* note 170, at 1198–1202; see Akhavan, *supra* note 168.

172. Chayes & Chayes, *On Compliance*, *supra* note 162, at 188; see ORAN R. YOUNG, *COMPLIANCE AND PUBLIC AUTHORITY: A THEORY WITH INTERNATIONAL APPLICATIONS* 105–06 (1979); Abram Chayes & Antonia Handler Chayes, *Compliance Without Enforcement: State Behavior under Regulatory Treaties*, 7 NEGOT. J. 311, 312 (1991).

173. See YOUNG, *supra* note 172, at 128–34; Chayes & Chayes, *On Compliance*, *supra* note 162, at 193–94; Chayes & Chayes, *Compliance Without Enforcement*, *supra* note 172, at 318, 325–27.

the state that are under the LRA's control.¹⁷⁴ What is more, the dense jungle of Uganda and the neighboring states make collecting intelligence of Kony's whereabouts by Ugandan Officers almost impossible.¹⁷⁵ Since 2008, the United States, which is notably not a party to the Rome Statute, has provided personnel to train Ugandan soldiers, as well as intelligence and financial assistance to capture Kony.¹⁷⁶ In a somewhat similar fashion, the Croatian government relied on United Kingdom intelligence and support from the MI6 to track down and ultimately arrest and surrender to the ICTY the former Croatian General Ante Gotovina.¹⁷⁷ These examples demonstrate two major points: first, that third states and particularly those technologically, financially, or geopolitically advanced are in a position to help with arresting indictees. Second, this help does not necessarily need to come from states party to the Rome Statute. What potential then do third states and IOs have to facilitate arrests either on their own initiative or through the OTP making effective use of its diplomatic capabilities?

3. *The Establishment of a Diplomatic Arm*

Article 87(5) of the Rome Statute envisions the possibility of the Court inviting assistance from states that are not party to the Rome Statute.¹⁷⁸ Non-state parties may enter into cooperative engagements with the Court on an ad hoc basis to offer various forms of assistance. In the language of treaty law, treaties are binding only on state parties and create no rights or obligations for a third party without its consent.¹⁷⁹ In the case of Article 87(5), the word "invite" is indicative of the voluntary nature of non-state party cooperation.¹⁸⁰ This voluntary nature becomes somewhat blurred,¹⁸¹ however, when the obligation to cooperate with the ICC derives

174. John Ahere & Grace Maina, *The Never-Ending Pursuit of the Lord's Resistance Army: An Analysis for the Elimination of the LRA*, POL'Y & PRAC. BRIEF (African Ctr. For Constructive Resol. Disputes (ACCORD), South Africa), Mar. 2013, at 1, 6.

175. Richard Lough, *Ugandan troops play jungle cat and mouse with Kony*, REUTERS (Apr. 20, 2012), <http://www.reuters.com/article/us-uganda-kony-idUSBRE83J10120120420>.

176. See ALEXIS ARIEFF ET AL., CONG. RESEARCH SERV., R42094, *THE LORD'S RESISTANCE ARMY: THE U.S. RESPONSE* 9-10 (2015), <http://www.fas.org/sgp/crs/row/R42094.pdf>.

177. See LAMONT, *supra* note 122, at 41.

178. See Banteka, *supra* note 16, at 453, 459.

179. "Article 34 of the Vienna Convention on the Law of Treaties states the *pacta tertiis nec nocent nec prosunt* principle: a treaty does not create either obligations or rights for a third state without its consent." *Id.* at 459 n.16. There may however, be some customary law obligations not to actively hinder accountability for international crimes. See G.A. Res. 3074, at 79 (Dec. 3, 1973) ("States shall not take any legislative or other measures which may be prejudicial to the international obligations they have assumed in regard to the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity.").

180. Banteka, *supra* note 16, at 460.

181. The public record reveals at least one formal request for assistance from the ICC to the United States with respect to the situation in Darfur. See Press Release, Sean McCormack, U.S. Dep't of State (July 14, 2008); see also Clint Williamson, Ambassador-at-Large for War Crimes Issues, U.S. Dep't of State, Remarks at the Century Foundation on Reassessing the International Criminal Court: Ten Years Past Rome (Jan. 13, 2009).

from the authority of the UNSC acting under its Chapter VII powers.¹⁸² By virtue of Article 25 of the UN Charter, such UNSC Resolutions are binding upon all UN member states thereby rendering UNSC referrals to the ICC equally authoritative upon all UN member states.¹⁸³

This Article restricts its scope to addressing only the instances where there has been no UNSC referral to the Court. Such instances ought to be analyzed under a different set of UN Charter obligations, including their shortcomings. While key non-state parties to the Rome Statute voice several unique concerns with regard to their engagement with the ICC, there is arguably a large area of overlap between their national interests and the ICC agenda. State interests are after all far from static and are subject to constant change, something that can be of great use to the ICC in this type of dynamic. For instance, a policy of positive cooperation with the ICC would give third states the considerable opportunity to become part of the shaping of the ICC agenda and how it conforms within the context of their interests. The pursuit of international justice is a unifying theme, which encompasses multiple operational pillars and actors. The ICC is only one pillar of a bigger system that includes diplomacy, institutional action led by the UNSC, local political and judicial mechanisms, and perhaps even military action.¹⁸⁴ Facilitating the work of the ICC does not necessarily have to impair the pursuit of the same or other interests under the rest of available options; if anything, facilitation should complement it.

The ICC bears significant legal and political tools to use towards this end despite the lack of a tangible enforcement power of its own. The most important of these tools is the role that the Prosecutor and her Office can play outside of the courtroom in wresting state cooperation.¹⁸⁵ While the acts of the Prosecutor are key to the development and success of the ICC, little attention has been paid¹⁸⁶ to the dynamics and consequences of the Prosecutor's actions in the convoluted international political rink. Yet it is at these decisive junctures of arrests enforcement that the Prosecutor is presented with the ultimate opportunity to infiltrate the political landscape. By doing so, she may employ strategies that can directly impact state cooperation and the overall pursuit of international criminal justice. Power struggles beyond the courtroom between the Prosecutor, situation countries, and the influential actors in the international community cannot

182. Zhu Wenqi, *On Co-operation by States Not Party to the International Criminal Court*, 88 INT'L REV. RED CROSS 87, 89-91 (2006).

183. See, e.g., S.C. Res. 1593, ¶ 2 (Mar. 31, 2005).

184. Banteka, *supra* note 16, at 460 (citing Tod Lindberg, *A Way Forward with the International Criminal Court*, 159 POL'Y REV. 15, 15 (2010)).

185. *Id.* at 461.

186. Notable exceptions include Phil Clark, *Law, Politics and Pragmatism: The ICC and Case Selection in the Democratic Republic of Congo and Uganda*, in *COURTING CONFLICT?: JUSTICE, PEACE AND THE ICC IN AFRICA* 37 (Nicholas Waddell & Phil Clark eds., 2008); Alex de Waal, *Darfur, the Court, and Khartoum: The Politics of State Non-Cooperation*, in *COURTING CONFLICT?: JUSTICE, PEACE AND THE ICC IN AFRICA* 29 (Nicholas Waddell & Phil Clark eds., 2008); Roper & Barria, *supra* note 29; and William A. Schabas, *Prosecutorial Discretion v. Judicial Activism at the International Criminal Court*, 6 J. INT'L CRIM. JUST. 731, 749-53 (2008). See SCHIFF, *supra* note 88.

be discounted lightly.¹⁸⁷ While the ICC is concentrated on rendering judicial outcomes within the four walls of a courtroom in The Hague, powerful international actors such as IOs (UN, EU, AU, et al.) and key powerful states are all part of a world that comes prior to the judicial one.¹⁸⁸ This leads to a coordination game that necessitates political leverage, bargaining, and the adoption of a negotiation strategy by the Prosecutor in order to achieve desired results.¹⁸⁹ In this struggle for cooperation, the Prosecutor is bound to need all the tools she can get from key global and regional actors in order to secure compliance from recalcitrant states.

Seeing international criminal justice as such a process compels the OTP to exercise diplomatic action and engage in a form of judicial diplomacy. This could be facilitated through the establishment of a diplomatic arm within the OTP in order to enhance its relationship with current member states and to build trust and understanding between the Office and non-member states. This practice should not strike us as odd given that the OTP is already engaged through its day-to-day operations in high-level politics: its engagement with the UNSC in cases of referrals; the political decisions of governments with regard to arrests; the political consequences of arrests of indicted individuals, who are usually key actors in the political fermentation of their regions; and everything in between.¹⁹⁰ After all, a Prosecutor's work is by its very nature "politicized" in that her purpose is to apprehend individuals and secure convictions while the Court as a whole is expected to be neutral and impartial.¹⁹¹ Even though the ICC as a whole is and ought to be non-political, independent, fair, and impartial, the very role of the OTP requires a set of maneuvers in order to fulfill its mandate that have very little to do with the judicial process.

It is for this reason that the OTP would benefit from improving its institutional capacity in order to be able to analyze the political situations at hand and engage in constructive judicial diplomacy both in situation countries as well as in the global political sphere.¹⁹² In the context of arrests, the OTP ought to incorporate a proactive approach in order to analyze and create strategies for using *realpolitik* in its favor. More practically, the OTP could achieve this by bringing in people with political and diplomatic expertise, who can analyze political situations and have experience both in specific regions, situation countries, and global politics. This will also facilitate the OTP to play a significant role in the creation of a clear and consistent policy agenda for the international community as a whole with regard both to indicted individuals as well as states that may contribute to their apprehension.

187. Banteka, *supra* note 16, at 461.

188. *Id.*

189. *Id.*

190. *Id.* at 462.

191. *Id.*

192. *Question on Arrest: What more can be done to secure the arrest and surrender of persons subject to arrest warrants issued by the International Criminal Court?*, ICC FORUM (Feb. 13, 2014), <http://iccforum.com/arrest>.

The OTP has taken an important step towards this direction in its 2012–2015 Strategic Plan through the organizational changes it has planned, especially with regard to the Jurisdiction, Complementarity, and Cooperation Division (“JCCD”) and the Investigations Division (“ID”).¹⁹³ The focus of the JCCD on managing strategic international contacts is moving towards the direction of establishing a more concrete role for the JCCD as that diplomatic arm the OTP needs in order to fully seize its tools as a political actor in the field of arrests. The next step in this would be the full engagement of the JCCD and the Prosecutor in embracing the political context within which the OTP operates and in improving its diplomatic leverage. This may well include relationship building in order to improve trust between the Court and state parties, examining situations of interest alignment between the OTP and states (whether parties or non-parties), as well as bargaining with governments that may advance the OTP’s task in securing arrests.

The singular nature of the ICC combined with the political dynamic of the OTP would benefit from a strategic model which integrates its judicial mandate with political cognizance. Under this model, the Prosecutor bears significant leverage in productively utilizing her bargaining power in order to increase cooperation. By recognizing the importance of key actors in the arrest and surrender coordination game, the OTP will be able to set and advance its agenda to gain the necessary leverage, allowing it to successfully carry out its mandate. This would not in fact politicize the Court but enable it to utilize all possible tools available without compromising its rigid legal standards.

Through its diplomatic unit, the OTP will be able to better assess the willingness and capabilities of member states to apply appropriate measures to ensure compliance either before issuing an arrest warrant or in instances of state noncompliance with one. The OTP could collect information about the likelihood of arrest, plan strategies with higher likelihood of success, and coordinate and combine the different capabilities and preferences of states towards non-compliant states. Even though the OTP has no formal say in the state or IO decision regarding the assumption of measures towards arrest and surrender, it may influence the decision-making process through successful engagement with their representatives for issues of cooperation.¹⁹⁴ A diplomatic arm of the OTP would also be given the ability to informally engage with relevant representatives and thus be involved in the bargaining process with situation states.

The OTP would also have the capacity to build strong cooperation and coordination within a network of activist states in order to promote compliance with arrest warrants. There is a core group of states that is traditionally very active in responding to the existence and punishment of international crimes committed outside their borders. I refer to these

193. OFFICE OF THE PROSECUTOR, INT’L CRIMINAL COURT, STRATEGIC PLAN JUNE 2012–2015, at 16 (2013).

194. Cedric Ryngaert, *The International Prosecutor: Arrest and Detention* 21 (Leuven Ctr. for Glob. Governance Stud., Working Paper No. 24, 2009).

states as “activist” states. For instance, Belgium and Spain have traditionally been very active in triggering their universal jurisdiction in order to put alleged perpetrators of international crimes before courts long before the establishment of the ICC.¹⁹⁵ The U.S. identity has long included a sense of responsibility for the prevention and punishment of international crimes.¹⁹⁶ The Netherlands is another example of a state that has incorporated a sense of identity with a proactive approach regarding international crimes. They have pushed for the creation of international courts and tribunals, and host most of them with a clear constitutional provision which promotes the development of an “international rule of law.”¹⁹⁷ This core group of states could harness the influence that stems from their strong identity in these matters to assist the ICC and the OTP in promoting compliance with arrest warrants.

4. *The United States as a Case Study of a Non-Member State*

a. The ICC–U.S. Cooperation Equation

President Barack Obama entered office¹⁹⁸ with a pledge to mitigate the hostile relationship between the United States and the ICC of the previous administration through reviewing and redrafting the U.S. policy towards the Court.¹⁹⁹ The issue of cooperation with the ICC was a central element of the stocktaking component during the ICC Review Conference.²⁰⁰ There the United States renewed its commitment towards accountability in instances of alleged violations that fall within the ICC jurisdiction, and especially in the situation of Uganda.²⁰¹ Looking at the U.S. policy comparatively throughout the past two administrations, Harold

195. See, e.g., Arrest Warrant of April 11, 2000 (Dem. Rep. Congo v. Belg.), Judgment, 2002 I.C.J. Rep. 121 (Feb. 14); Regina v. Bow Street Metropolitan Stipendiary Magistrate, Ex Parte Pinochet Ugarte [1999] 1 AC 147 (HL) (Eng.).

196. ARIEFF ET AL., *supra* note 176, at 1.

197. Gw. [Constitution] art. 90 (Neth.).

198. Nora Boustany, *Official Floats Possibility of Assistance to Hague Court*, WASH. POST, (June 12, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/06/11/AR2007061102347.html>; Jess Bravin, *U.S. Accepts International Criminal Court*, WALL ST. J., (Apr. 26, 2008), <http://www.wsj.com/articles/SB120917156494046579>; Jess Bravin, *U.S. Warms to Hague Tribunal*, WALL ST. J., (June 14, 2006, 12:01 AM), <http://www.wsj.com/articles/SB115024503087679549>; Sue Fleming, *U.S. Takes More Pragmatic View of World Court*, REUTERS, (May 7, 2008), http://www.amicc.org/docs/5-7-2008_Reuters.pdf; *Taylor War Crimes Trial Worries West Africa*, NPR (Apr. 6, 2006), <http://www.npr.org/templates/story/story.php?storyId=5327167>.

199. See AM. SOC'Y INT'L L., U.S. POLICY TOWARD THE INTERNATIONAL CRIMINAL COURT: FURTHERING POSITIVE ENGAGEMENT (2009); Megan A. Fairlie, *The United States and the International Criminal Court Post-Bush: A Beautiful Courtship but an Unlikely Marriage*, 29 BERKELEY J. INT'L L. 528, 528–29 n.2 (2011); Press Release, Robert Wood, Acting Spokesman, U.S. Dep't State (Feb. 12, 2009), <https://www.state.gov/r/pa/prs/dpb/2009/02/117252.htm>.

200. See, e.g., INT'L CRIM. CT., REPORT OF THE BUREAU ON STOCKTAKING: COOPERATION (2010); INT'L CRIM. CT., STOCKTAKING OF INT'L CRIM. JUST., COOPERATION: [DRAFT] SUMMARY OF THE ROUNDTABLE DISCUSSION 7 (2010).

201. See Review Conference of the Rome Statute, Doc. No. RC/9-ENG-15072010, Pledges, at 18 (July 15, 2010), <https://asp.icc-cpi.int/NR/rdonlyres/18B88265-BC63-4DFF-BE56-903F2062B797/0/RC9ENGFRASPA.pdf>.

Koh was not wrong to state that under the Obama administration²⁰² the U.S.-ICC relationship has been “rest from hostility to positive engagement.”²⁰³ Perhaps the most remarkable momentums of this cardinal transition in U.S. policy were the February 2011 vote of the United States in favor of the UNSC resolution referring the situation in Libya to the Court²⁰⁴ and most notably the lobbying the United States engaged in to get other states on the Council to support the referral.²⁰⁵ This, of course, is not to say that the road to a richer engagement with the ICC is without hurdles. The most important wall the U.S. administration has to pierce is the domestic political challenges of how a U.S. involvement with the Court is perceived.²⁰⁶ In order to dilute this controversy, a U.S. policy of cooperation with the ICC that is carefully pursued over time and delivers concrete substantive benefits to U.S. interests is the best path for developing a relationship with the Court.²⁰⁷

While there are many areas and forms of cooperation between the ICC and non-state parties, this section focuses on the possibility of a direct cooperation with the Court on the arrest and surrender of suspects. Having established the lack of obligation for third states to directly assist the ICC with the exception of a UNSC referral, the question of what a cooperative engagement between the United States and the Court could look like surfaces. As a matter of international law, the United States is unconstrained in exercising its voluntary right to assist the Court.²⁰⁸ As a matter of domestic law however, the waters become slightly muddier for two reasons. First, the legislation passed during the George W. Bush administration and more specifically the American Service-Members Protection Act (“ASPA”)²⁰⁹ restricts cooperation with the ICC, particularly barring the U.S. government from providing any support to the Court.²¹⁰ Even though

202. See *Hearing on the Nomination of Hillary Rodham Clinton of New York to be Secretary of State before the Sen. Comm. On Foreign Relations*, 111th Cong. 66 (2009) (statement of Sen. Hillary Rodham Clinton); see also Permanent Rep. of the U.S. to the U.N., Statement on Respect for Int’l Humanitarian L. addressed to the President of the Security Council (Jan. 29, 2009).

203. *U.S. Engagement*, *supra* note 13.

204. S.C. Res. 1970 (Feb. 26, 2011).

205. Joe Lauria, *U.N. Imposes Sanctions on Gadhafi*, WALL ST. J. (Feb. 27, 2011), <http://www.wsj.com/articles/SB10001424052748703796504576169110415048124>; Edward Wyatt, *Security Council Calls for War Crimes Inquiry in Libya*, N.Y. TIMES (Feb. 26, 2011), http://www.nytimes.com/2011/02/27/world/africa/27nations.html?_r=1.

206. See generally Paul W. Kahn, *Why The United States Is So Opposed* (Dec. 2003), http://web.uncg.edu/dcl/courses/humanright/paul_kahn.pdf.

207. See Douglas Dunbar, *The Obama Administration’s Evolving Policy Toward the International Criminal Court*, AMICC (updated 2011), <http://www.amicc.org/docs/ObamaPolicy.pdf>.

208. Rome Statute, *supra* note 17, art. 116.

209. Following two earlier unsuccessful attempts at passing it, ASPA was approved with strong bipartisan support by both houses of Congress and signed into law by the President on August 2, 2003. The most relevant provisions of the Act, sections 2004–2007, contain numerous restrictions on interaction by U.S. Federal or State government entities or courts with the ICC. See National Defense Authorization Act, Pub. L. No. 107–206, 116 Stat. 820, 902–05 (2002).

210. See *id.*

the ASPA has been relatively declawed, “support” is broadly defined to include “assistance of any kind, including financial support, transfer of property, or other material support, services, intelligence sharing, law enforcement cooperation, the training or detail of personnel, and the arrest or detention of individuals.”²¹¹ On the flipside, with the passage of the so-called Dodd Amendment,²¹² such restrictions on cooperation do not apply with respect to efforts in bringing to justice foreign nationals that are accused of genocide, war crimes, and crimes against humanity.²¹³ While the relationship of the Dodd Amendment *vis-à-vis* the more restrictive parts of the ASPA is unclear,²¹⁴ it is probably safe to argue that they allow for a case-by-case decision of engagement with the ICC. The forms of such assistance would therefore have to fall within the permitted range of ASPA, interpreted widely as read in conjunction with the Dodd Amendment. Second, the United States under the George W. Bush administration²¹⁵ has entered into a series of bilateral immunity agreements with multiple ICC state parties under Article 98 of the Rome Statute. While the rationale of the United States in securing those agreements was to effectively protect U.S. citizens from ICC jurisdiction, most of those agreements contain

211. 22 U.S.C. § 7432 (2008).

212. 22 U.S.C. § 7433 (2002). The Dodd Amendment specifically provides that “[n]othing in this title shall prohibit the United States from rendering assistance to international efforts to bring to justice Saddam Hussein, Slobodan Milosevic, Osama bin Laden, other members of Al Queda, leaders of Islamic Jihad, and other foreign nationals accused of genocide, war crimes or crimes against humanity.” *Id.* This aspect of the Act earned the ASPA. See American Non-Governmental Organizations Coalition for the International Criminal Court, *Chronology of US Opposition to the International Criminal Court: From ‘Signature Suspension’ to Immunity Agreements to Darfur* (updated 2008), <http://faculty.maxwell.syr.edu/hpschmitz/PSC124/PSC124Readings/USandICCChronology.pdf>.

213. 22 U.S.C. § 7433 (2002).

214. See Beth Van Schaack, *State Cooperation & the International Criminal Court: A Role for the United States?*, SANTA CLARA L. DIG. COMMONS 1, 8 (2011), <http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1615&context=facpubs> (quoting Williamson, *supra* note 181).

We have really relied on the final provision of ASPA, which is sort of this get-out-of-jail-free card, which says that nothing in this act shall constrain the [United States] from doing what’s necessary to bring people to justice for genocide and other serious crimes. We have used this final provision to license our interaction with the ICC. But it’s [sic] really can be applied on a case by case basis, and this has allowed us, I think, great latitude on Darfur.

Id.

215. For the position of the Bush administration regarding the Article 98 bilateral agreements, see generally John R. Bolton, *American Justice and the International Criminal Court*, DISAM 28, 29 (2003), http://www.amicc.org/docs/Bolton11_3_03.pdf. As a point of historic reference, negotiations for the conclusion of bilateral non-surrender agreements began in the summer of 2002 as part of a major diplomatic campaign. Prior to it, in April 2002, all U.S. ambassadors were asked to examine whether other nations were willing to conclude bilateral agreements protecting U.S. nationals from ICC jurisdiction. At the same time, considerable diplomatic and financial pressure was exerted. See D. McGoldrick, *Political and Legal Responses to the ICC*, in THE PERMANENT INTERNATIONAL CRIMINAL COURT, LEGAL AND POLICY ISSUES 389, 424 (Dominic McGoldrick, Peter Rowe & Eric Donnelly eds., 2004).

reciprocal obligations²¹⁶ equally barring the United States from handing over citizens of those states to the ICC. Among the currently open situations before the ICC, the Central African Republic ("CAR"), the DRC, Uganda, and Cote D' Ivoire have such reciprocal bilateral agreements with the United States.²¹⁷ The legality of these agreements has been sharply contested when the second party to them is a state party to the Rome Statute,²¹⁸ but a judicial body has never examined their legality domestically or internationally to this point. The restrictive effect such agreements could have on U.S. cooperation with the ICC in situations of state parties is therefore unclear.

While the United States voices several unique concerns regarding its engagement with the ICC, there is a large and strong area of overlap between national U.S. interests and the ICC agenda to bring to justice those responsible for egregious human rights violations. Inasmuch as domestic U.S. legislation may limit the extent of this potential cooperation, the same legislation equally allows for certain policy maneuvers. First, a policy of positive cooperation with the ICC would give the United States the considerable opportunity of taking part in the shaping of the ICC agenda and how it conforms within the context of U.S. interests.²¹⁹ The current ICC efforts are certainly in line with the United States' goal of pursuing those responsible for the worst international crimes, however distorted of a picture the past U.S./ICC interactions may have painted of this.²²⁰ Viewing the ICC as part of this bigger system and not as isolated and unipolar will allow for a cooperation that ultimately brings the United States into a position to ask what it can do to help the Court.²²¹ Satisfying

216. Not all of the Article 98 treaties entered into by the United States are reciprocal. See generally Am. Non-Governmental Organizations Coalition for Int'l Crim. Ct., *US & the ICC: Bilateral Immunity Agreements*, AMICC, <https://www.amicc.org/bilateral-immunity-agreements-1> (last visited Nov. 7, 2016).

217. See generally Agreement Between the United States of America and Uganda, U.S.-Uganda, June 12, 2003, T.I.A.S. No. 03-1023 (entered into force Oct. 23, 2003); Agreement Between the United States of America and the Central African Republic, C.A.R.-U.S., Jan. 13-19, 2004, T.I.A.S. No. 04-119 (entered into force Jan. 19, 2004); Agreement Between the United States of America and the Democratic Republic of the Congo, D.R.C.-U.S., Mar. 19, 2003, T.I.A.S. No. 03-722.2 (entered into force July 22, 2003); Agreement Between the United States of America and Cote D'Ivoire, C.I.-U.S., June 30, 2003, T.I.A.S. No. 03-1016 (entered into force Oct. 16, 2003).

218. See Eur. Consult. Ass., *Draft Council Conclusions on the International Criminal Court* (Doc. No. 12488/1/02) (Sept. 30, 2002), <https://www.consilium.europa.eu/uedocs/cmsUpload/ICC34EN.pdf> (stating that U.S. agreements are inconsistent with State Parties' obligations to the Rome Statute); Kenneth Roth & Richard Dicker, *Letter Urging Continued Resistance to U.S. Impunity Agreements*, HUMAN RTS. WATCH (Oct. 21, 2002), <https://www.hrw.org/legacy/press/200> (noting that U.S. agreements are illegal under general international law); see also James Crawford, Philippe Sands & Ralph Wilde, *In the Matter of the Statute of the Intenational [sic] Criminal Court and in the Matter of Bilateral Agreements Sought by the United States under Article 98(2) of the Statute: Joint Opinion*, June 5, 2003, at 2.

219. See Paul C. Szasz, *The United States Should Join the International Criminal Court*, A.F. ACAD. J. LEGAL ST. 1, 1-32 (1998-99).

220. See, e.g., Rome Statute, *supra* note 17, art. 5,

221. This shift has been observed as the Obama administration proactively arranged meetings with ICC officials to discuss the ways in which the U.S. can help the Court. See

its side of the bargain, the ICC can advance its interests by seizing the plethora of resources the United States may be in a position to offer, from operational facilitation and capacity building to intelligence sharing and diplomatic pressure in apprehending suspects.²²² In tandem, the United States may come to find that such a positive cooperation may turn out to be particularly effective in seizing utility and maximizing its international payoffs as a global key actor position it wishes to remain. In practice, there have already been situations in which cooperation with the ICC as a matter of policy would advance the U.S. interests. Two obvious examples are the UNSC referral of the situation in Darfur, and the self-referral of Uganda regarding the LRA,²²³ both instances that indubitably fall within the U.S. strategic interests.²²⁴ Such mutually beneficial relationship promises to ultimately enhance the international justice efforts and restore the United States to a leadership position in this area.

b. U.S. Interests in Africa & Indirect Cooperation

While national interests are particularly abstruse and hard to uncover, the United States has been fairly consistent in its basic strategic pursuits throughout the recent years despite the different approaches in implementation. A new theme and overarching goal that emanated from the current geopolitical developments is the renewal of the United States' status as a global leader in the present and coming years.²²⁵ When it comes to interests of national and international economy, security, and justice, the U.S.

Stephen J. Rapp, U.S. Ambassador-at-Large for War Crimes, Statement regarding stocktaking at the Eighth Resumed Session of the Assembly of States Parties of the ICC (Mar. 23, 2010). The need for this assistance is strong. See Statement of Beatrice Le Fraper Du Hellen, Special Advisor to the Prosecutor at the ICC, *Seeking Global Justice*, CNN's AMANPOUR, Mar. 24, 2010, <http://archives.cnn.com/TRANSCRIPTS/1003/24/ampr.01.html> ("We have our shopping list ready of requests for assistance . . . from the American government."). Unsurprisingly, at the top of the list is a request for U.S. operational support to facilitate the execution of the arrest warrants that have been issued by the ICC. *Id.*

222. Amanda Claire Grayson, *Is ICC Submission in the Best Interest of US National Security? A Cost-Benefit Analysis*, 1 GLOBAL SEC. STUD. 130, 140 (2010), <http://global-securitystudies.com/Grayson%20ICC%20TWO.pdf>.

223. See Press Release, President of Uganda Refers Situation Concerning the Lord's Resistance Army (LRA) to the ICC, U.N. Press Release AFR/821-L/3055 (Jan. 29, 2004), <http://www.un.org/press/en/2004/afr821.doc.htm>. On the prosecutor's focus on LRA crimes, see also SCHIFF, *supra* note 88, at 198-99.

224. On May 24, 2010, President Obama signed into law the LRA Disarmament and Northern Uganda Recovery Act of 2009, which aims to:

[S]upport stabilization and lasting peace in northern Uganda and areas affected by the Lord's Resistance Army through development of a regional strategy to support multilateral efforts to successfully protect civilians and eliminate the threat posed by the Lord's Resistance Army and to authorize funds for humanitarian relief and reconstruction, reconciliation, and transitional justice, and for other purposes.

Lord's Resistance Army Disarmament and Northern Uganda Recovery Act of 2009, Pub. L. No. 111-172, 124 Stat. 1209 (2010).

225. See generally U.S. DEP'T OF DEFENSE, SUSTAINING U.S. GLOBAL LEADERSHIP: PRIORITIES FOR 21ST CENTURY DEFENSE (2010), http://archive.defense.gov/news/Defense_Strategic_Guidance.pdf.

strategy focuses on strengthening international institutions and galvanizing collective action as the two ways in which it can pursue national, international, and shared interests.²²⁶

State interests are not static and they are subject to constant change but certain interests are so fundamentally intrinsic to a country's identity that can be considered relatively fixed and time resistant. For the United States, one set of such interests is respect for universal values, human rights, and an international order that promotes peace, security, and opportunity.²²⁷ While this may not always be an isolated set of interests pursued, when upheld, it is an integral, decisive, and molding factor of the U.S. international security policy. This becomes even clearer in light of the 2015 National Security Strategy report which spells out four enduring national interests: security, prosperity, values, and international order.²²⁸ When seen through this prism, each of those interests becomes inextricably linked with the rest, making their pursuit in isolation of one another effectively futile. The common thread is the need for a realignment of national action with international partners, both states and institutions, who share common sets of interests.²²⁹

The United States has a renewed interest in gaining and preserving strong alliances.²³⁰ Admittedly, the foundation of both national and international security lies with a state's relations with its international allies. In this effort, the United States relies on the American Armed Forces as its strength with significant bearing.²³¹ In its most recent strategy agenda, the United States has committed to continue supporting its allies as well as reinforcing international efforts against potential adversaries.²³² In the field of international justice, the United States has a specific interest in ending impunity and promoting justice.²³³ To this end, the United States aspires to facilitate the rebuilding of national judicial systems and to support the ad hoc, internationalized tribunals, and ICC when in line with U.S. interests.²³⁴ Through an examination of the main U.S. strategic interests, accountability for perpetrators of human rights violations is one important common area of overlap among the four pillars of strategic interests.

In pursuing this end of criminal accountability, the position of the ICC as an integral actor within the international criminal justice system cannot be overstated. Despite the United States' reluctance towards the Court, it is possible to uncover potential engagements with it that the

226. See WHITE HOUSE, NATIONAL SECURITY STRATEGY (2010) http://www.whitehouse.gov/sites/default/files/rss_viewer/national_security_strategy.pdf.

227. *Id.* at 7.

228. WHITE HOUSE, NATIONAL SECURITY STRATEGY 26-27 (2015), https://www.whitehouse.gov/sites/default/files/docs/2015_national_security_strategy.pdf.

229. *Id.* at 23-24.

230. *Id.*

231. *Id.*

232. *Id.*

233. *Id.* at 33.

234. *Id.*

United States would feel comfortable supporting. It is true that both the United States and the ICC are faced with a thin balance when it comes to their potential cooperation. The United States on the one hand wishes to be seen as sufficiently independent from the Court and is weary of possible implications with ICC's mandate.²³⁵ The ICC, on the other hand, fears to be perceived as over politicized, something that could destroy its legacy as an international judicial institution.²³⁶ Admittedly, these are extreme outcomes albeit with realistic bearing. Cooperation with the ICC does not necessarily require an active engagement with the Court itself, however. If the purpose of the ICC is understood as the quest to end impunity and establish accountability for the four international crimes within its jurisdiction, there are multiple ways in which the United States could facilitate this goal without directly and actively providing assistance to the ICC yet remaining in its periphery.

The first way the United States could facilitate international accountability is through capacity building and the enhancement of the domestic legal systems in relevant states.²³⁷ Taking advantage of the principle of complementarity that gives way to genuine national prosecutions, the shared goal of the United States and the ICC can be achieved indirectly without having to necessarily sit at the same table.²³⁸ Secondly, the United States can provide training, equipment, and intelligence assistance to allied countries in order to facilitate the apprehension of ICC indictees.²³⁹ While this does not require a military intervention on the part of the United States, it offers significant advantage to states located within the dense African continent in discovering the whereabouts of those wanted by the ICC. Again, this avoids a direct relationship between the Court and the United States while at the same time strengthening and preserving its relationships with its allies. Somewhat related to this is the third way in which the United States can indirectly support the efforts of the ICC and that is through the exercise of diplomatic pressure or rewards on those states whose cooperation is key for the apprehension of suspects.²⁴⁰

On the flip side, the United States has political and economic interests in Africa relating to democratic governance, trade, market infiltration, and oil.²⁴¹ Africa is the largest potential upcoming market and one that is particularly primeval.²⁴² As China continues to establish a dominant position along the eastern coastline of the continent through aid and investment,

235. See *U.S. Engagement*, *supra* note 13.

236. See Douglas Dunbar & Julia Martínez Vivancos, *Report on the Review Conference of the Rome Statute of the International Criminal Court, Kampala, Uganda, May 31-June 11, 2010*, AM. NON-GOVERNMENTAL ORG. COAL. FOR THE INT'L CRIM. CT., June 25, 2010, at 8.

237. The United States at the Review Conference of the Rome Statute pledged to support capacity building as well as facilitate domestic prosecutions. See Review Conference of the Rome Statute, *supra* note 201, at 18.

238. *Id.* at 2-4.

239. *Id.* at 3.

240. *Id.* at 2.

241. WHITE HOUSE, NATIONAL SECURITY STRATEGY, *supra* note 228.

242. *Id.* at 4.

the United States needs a valuable economic counterweight to retain its viable role there.²⁴³ The infiltration of the United States in the developing markets carries an invaluable benefit to the United States both in facilitating the development of free-markets and in establishing a vital trade position in the continent. The establishment of democratic governance coupled with alliance strengthening is critical for the furtherance of the United States' economic interests in the region. For instance, a reinforcement of the U.S. alliance with Uganda could make use of Uganda's growing economy in order to increase trade within the East African Community ("EAC"). Exporting primarily through ports in Mombasa and Dar es Salaam, the EAC still has problems accessing the markets of its interior members.²⁴⁴

The newly discovered oil reserves around the Great Lakes in Central Africa also fall within the primary interests of the United States.²⁴⁵ Not only does the United States obtain 20% of its imported oil from Africa but it is also in its interests to maintain and expand U.S. access to African energy.²⁴⁶ Uganda's Lake Albert could open up new trade corridors and promote the creation of additional interior trade routes from the DRC and South Sudan, through Uganda, to Kenya and northern Tanzania.²⁴⁷ By facilitating a policy of accountability and democratization in Africa through empowering the role of the ICC in this endeavor, the United States may also galvanize its economic and geopolitical interests in the area. Through such an integrated international security and economic policy, the United States may increase its influence with the African states, reassert its role as the global leader in issues of international concern, cultivate new alliances or stabilize old ones, and finally assert its economic interests in the continent.

III. The Role of Civil Society

Liberal theories in international relations are the primary field of a multi-causal explanation for the behavior of states.²⁴⁸ They understand states as larger institutions that are made up from the aggregate of preferences of the non-state actors within them.²⁴⁹ These non-state actors in

243. *Id.* at 24.

244. U.S. *Strategic Interests in Uganda*, STRATFOR (Mar. 8, 2012), <https://www.stratfor.com/analysis/us-strategic-interests-uganda>.

245. *Id.*

246. David H. Shinn, Former U.S. Ambassador to Burk. Faso and Eth., Africa, Remarks at the George Washington University China Policy Program and China Institute of International Studies Fifth Symposium: U.S.-China Relations in a Global Context (June 1, 2011), davidshinn.blogspot.com/2011/06/us-africa-relations-and-cooperation.html.

247. U.S. *Strategic Interests in Uganda*, *supra* note 244.

248. Stephen D. Krasner, *Global Communications and National Power: Life on the Pareto Frontier*, 43 *WORLD POLITICS* 336, 337-42 (1991) (discussing the importance of considering factors beyond market failure for regime analysis).

249. Andrew Moravcsik, *Liberal Theories of International Law*, in *INTERDISCIPLINARY PERSPECTIVES ON INTERNATIONAL LAW AND INTERNATIONAL RELATIONS: THE STATE OF THE ART* 83, 84 (Jeffrey L. Dunoff & Mark A. Pollack eds., 2013).

turn, shape state interests based on the level of their organization, weight in society, and political influence.²⁵⁰ Anne-Marie Slaughter views states as “configurations of individual and group interests, who then project those interests into the international system through a particular kind of government.”²⁵¹ Realism, by attempting to explain the outcomes of strategic interaction and bargaining, does not focus on how these coordination games come into being.²⁵² Liberal theories manage to get a different view of the substantive content of international interactions.²⁵³ Under this liberal lens, we can assess compliance by focusing on the influence civil society may have on the situation states and third states, as well as the influence of transnational networks in realizing the goal of compliance with ICC arrest and surrender requests.

A. Civil Society & Situation States

Civil Society within situation states has the ability to directly apply pressure on their government to execute arrest warrants, or even apply pressure to hinder arrests. In 2003 the former Liberian President Charles Taylor, against whom the SCSL issued an open arrest warrant, fled to Nigeria where President Obasanjo granted him asylum.²⁵⁴ Two Nigerian businessmen who alleged offences against them by Taylor’s forces in Liberia challenged in Nigerian Courts the legality of his asylum and requested his extradition to SCSL.²⁵⁵ At first the Nigerian judiciary took no action and delayed the case.²⁵⁶ After the substantial support the claimants received from local and transnational NGOs providing them with resources to pursue the claim and mounting a massive public campaign within and beyond Nigeria, however, the case was finally heard by a court.²⁵⁷ Of course, the case of Charles Taylor was already on the agenda of the international community as it formed part of the SCSL docket.²⁵⁸ Nonetheless, the combined efforts of domestic protest coupled with national and transnational NGOs not only kept the issue on the agenda but also contributed to its resolution.²⁵⁹ In the face of domestic and international pressure, senior Nigerian politicians who had kept silent before voiced their support for the specific legal case as well as the general movement towards Taylor’s arrest and extradition.²⁶⁰

After nearly three years the combined effort of states and civil society

250. *Id.* at 84-85.

251. Anne-Marie Slaughter, *International Relations, Principal Theories*, in *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* 1, 4 (Max Planck ed., 2011).

252. Krasner, *supra* note 248.

253. Moravcsik, *supra* note 249, at 87.

254. Gill Wigglesworth, *The End of Impunity? Lessons from Sierra Leone*, 84 INT’L AFF. 809, 815-17 (2008).

255. *See id.* at 809.

256. *See id.* at 809, 815-17.

257. OPEN SOCIETY JUST. INITIATIVE, ANNUAL REPORT 2007: CIVIL SOCIETY PRESSURE: ENDING CHARLES TAYLOR’S ASYLUM (2007).

258. *Id.*

259. *Id.*

260. *Id.*

led to the flight and subsequent arrest of Charles Taylor.²⁶¹ This case illustrates the potential of domestic civil society actors to influence their own governments but also the power of domestic and transnational advocacy networks to influence states. On the other hand, in the situation of the former Yugoslavia, civil society was heavily opposed to ICTY cooperation and the arrest and extradition of their “hometown heroes.”²⁶² The media also played a big role in this context. Serbian media was run, in large part, by the same people who during the war engaged in hate speech and incitement against Bosniaks and Croats.²⁶³ Most mass media reports after the establishment of the ICTY tended to victimize the Serb population and question the legality and legitimacy of the ICTY.²⁶⁴ Accordingly, the pressure from the civil society was rarely on the government to arrest ICTY indictees but instead developed an atmosphere of denunciation of the ICTY and legitimization of the alleged perpetrators.²⁶⁵ This social environment in the former Yugoslavia may well have been a factor in the bad initial arrest record of the court.

B. Civil Society & Third States

Domestic actors have also influenced the decision of third states to take action against a state that does not comply with ICC’s arrest warrants. In the case of the arrest warrant against Al-Bashir, proponents of the Court often argue that ideally, the arrest warrant ought to hinder him from effectively engaging in international politics, undermining his credibility and ultimately leading to his arrest and regime change.²⁶⁶ The cooperation of third states is thus required in order to hinder his free traveling by making him a pariah as a crucial part of OTP’s long-term strategy for the execution of the arrest warrant.²⁶⁷ For this purpose, civil society has played an important part in both Kenya and the CAR demanding that Al-Bashir not be welcomed.²⁶⁸ Civil society in both these ICC member states protested and pressured the governments, which led to cancellations of the expected visits, imposing a *de facto* travel ban.²⁶⁹ In Serbia, the United States applied pressure on Belgrade to arrest those indicted by the ICTY including

261. Amnesty International and Patricia M. Wald see civil society as causal factor for Taylor’s arrest. Dicker sees the combined pressure of third States as a significant factor. See Wald, *supra* note 120, at 246; *Civil Society Efforts to Bring Charles Taylor to Justice*, HUMAN RIGHTS WATCH (Apr. 23, 2012, 3:55 PM), <http://www.hrw.org/news/2012/04/23/civil-society-efforts-bring-charles-taylor-justice>; Dicker, *supra* note 164.

262. A poll in Serbia showed that only 15% of the population supported cooperation with the ICTY. See Wald, *supra* note 120, at 246.

263. Nenad Golčevski et al., *Facing the Past: Media Framing of War Crimes in Post-Conflict Serbia*, 6 MEDIA, WAR & CONFLICT 118, 129 (2013).

264. *Id.* at 119, 126, 127, 129.

265. *Id.*

266. Gosnell, *supra* note 78, at 845.

267. *Id.*

268. Stella Ndirangu, *Kenyan Civil Society Calls on UNSC to Refuse ICC Investigation Deferral*, 42 MONITOR 6, 7 (2011), <http://connection.ebscohost.com/c/articles/65528341/kenyan-civil-society-calls-unscc-refuse-icc-investigation-deferral>.

269. *Id.*

the former head of state Slobodan Milošević.²⁷⁰ In this case also, civil society and NGOs played a substantial role in shaping U.S. policy, which ultimately turned out critical for the arrest and surrender of those indicted.²⁷¹ Finally, an example of how civil society and NGOs in particular can influence governments to take action is the campaign of the NGO Invisible Children.²⁷² Despite the controversial character of the content and accuracy of the campaign,²⁷³ Invisible Children produced the YouTube video “Kony 2012” that was received by an extremely large audience within and outside of the United States. The U.S. government explicitly took into account this campaign that significantly helped improve the general awareness surrounding Joseph Kony’s arrest,²⁷⁴ and identified the ICC as a legitimate and responsible institution for Kony’s potential arrest and trial.

C. Transnational Networks

Often, the lines between local, foreign, and transnational NGOs are not clearly drawn. Specialized transnational NGOs such as Human Rights Watch and Amnesty International along with their local offices have been heavily involved in situations where international crimes are alleged to have been committed.²⁷⁵ Transnational networks are the subject of much attention in the liberalist as well as constructivist scholarship. These approaches view transnational networks either as a result of the interconnectedness of various networks of governmental officials, states, and non-state actors including their role in shaping state action,²⁷⁶ or as transnational advocacy groups with an effect on the emergence of international norms.²⁷⁷ Thus, the formation of transnational networks in order to pursue a common agenda and influence the preferences of states can be of particular importance to the ICC arrest and surrender pursuit.²⁷⁸ Perhaps the most well-known example of such a transnational network’s success is the advocacy for and eventual adoption of the Ottawa Convention against Antipersonnel Mines.²⁷⁹ Unsatisfied with states’ slow and stale effort to address a weapon that was responsible for a myriad of indiscriminate civil-

270. Tracey Gurd, *Arresting the “Big Fish”: Lessons on State Cooperation for the International Criminal Court*, in *THE ENFORCEMENT OF INTERNATIONAL CRIMINAL LAW* 27, 28–29 (Nick Donovan ed., 2009).

271. *Id.*

272. *Id.*

273. Ryan Hal Budish, *Click to Change: Optimism Despite Online Activism’s Unmet Expectations*, 26 EMORY INT’L L. REV. 745, 755–57 (2012).

274. ARIEFF ET AL., *supra* note 176, at 2 n.8.

275. *See* Gurd, *supra* note 270.

276. *See, e.g.*, ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* (Princeton Univ. Press 2004).

277. *See, e.g.*, MARGARET E. KECK & KATHRYN SIKKINK, *ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS* 1–2 (Cornell Univ. Press 1998); SIDNEY TARROW, *THE NEW TRANSNATIONAL ACTIVISM* 20 (Jack A. Goldstone et al. eds., Cambridge Univ. Press 2005); M. Finnemore & K. Sikkink, *International Norm Dynamics and Political Change*, 52 INT’L ORG. 887, 887 (1998).

278. TARROW, *supra* note 277, at 161–79.

279. Richard Price, *Reversing the Gun Sights: Transnational Civil Society Targets Landmines*, 52 INT’L ORG. 613, 613 (1998).

ian deaths in more than a dozen countries, humanitarian and public health NGOs decided to form a coalition to reach a comprehensive agreement against its deployment and use.²⁸⁰ This coalition was backed by efforts of IOs such as the ICRC and the UN as well as a core number of states interested in the prohibition of anti-personnel landmines such as Canada, Norway, and France. These states provided the coalition with resources and enhanced its perceived legitimacy.²⁸¹ After an initial slow progress, the coalition expanded to NGOs, IOs, and states globally leading to the adoption of the Ottawa treaty in 1998 and further advocacy and endorsement of the rule as customary international law by states.²⁸²

The success of the Landmine Convention has been attributed to different actors; some view it as a result of the transnational NGO movement,²⁸³ others of the determined efforts by the core states,²⁸⁴ and others as a result of IOs determination.²⁸⁵ Perhaps a more comprehensive approach is to understand the success of the coalition as a combination of all these factors.²⁸⁶ This suggests that transnational networks are particularly effective when comprised of different actors such as states, NGOs, and IOs, and have a narrow focal point like the prohibition of landmines.²⁸⁷ Even though the landmines campaign advocated for the adoption and diffusion of a new norm instead of demanding compliance with an existing one, it illustrates the ways in which concerted action among different actors may influence state behavior. For our purposes the case of Charles Taylor comes again as an example. After it was clear that Taylor was granted political Asylum in Nigeria, a network was formed to bring about enforcement of an international norm manifested in the ICC arrest warrant.²⁸⁸ More specifically, over 360 NGOs from 17 African states and transnational NGOs such as Human Rights Watch and Amnesty International formed the coalition "Campaign Against Impunity," which intensively lobbied for Taylor's arrest within and outside Nigeria.²⁸⁹ An inter-state network comprised of the United States, United Kingdom, and Liberia supported this network.²⁹⁰ The UN and SCSL were also inevitably involved in the coordination of these efforts as part of the greater network of states and NGOs

280. *Id.*

281. See generally Robert J. Lawson et al., *The Ottawa Process and the International Movement to Ban Landmines*, in *TO WALK WITHOUT FEAR: THE GLOBAL MOVEMENT TO BAN LANDMINES* 160 (M.A. Cameron et al. eds., Oxford Univ. Press 1998).

282. *Id.*; TARROW, *supra* note 277, at 174; see also APLC State Parties and Signatories, UNITED NATIONS, <https://www.un.org/disarmament/geneva/aplc/states-parties-and-signatories/> (last visited Nov. 7, 2016).

283. Price, *supra* note 279.

284. See generally V. Warmington & C. Tuttle, *The Canadian Campaign*, in *TO WALK WITHOUT FEAR: THE GLOBAL MOVEMENT TO BAN LANDMINES*, *supra* note 281, at 48.

285. See generally S. Maslen, *The Role of the International Red Cross*, in *TO WALK WITHOUT FEAR: THE GLOBAL MOVEMENT TO BAN LANDMINES*, *supra* note 281, at 80.

286. TARROW, *supra* note 277, at 174.

287. *Id.* at 175.

288. J. BECKER, *CAMPAIGNING FOR JUSTICE: HUMAN RIGHTS ADVOCACY IN PRACTICE* 116-17 (Stanford Univ. Press 2013).

289. *Id.*; see also OPEN SOCIETY JUST. INITIATIVE, *supra* note 257.

290. Dicker, *supra* note 164.

that finally facilitated the arrest of Charles Taylor.²⁹¹

D. Civil Society at the Bargaining Table

As the role of civil society towards the enforcement of arrest warrants starts to become more understood, the OTP should begin to implement its potential in order to increase the rates for execution of arrest warrants. A first way the OTP may employ is to engage the civil society in the bargaining game. When the OTP bargains with states regarding the execution of arrest warrants, it should simultaneously address the civil society, engage in outreach activities, and capitalize on the existing network of NGOs that support the Court.

When unpacking the development of state interests, liberal institutionalism gives significant weight to the role of non-state actors.²⁹² Putnam has long coined the expression of the “two level game” that states must engage in on the international and the domestic planes simultaneously regarding issues of international law and international relations.²⁹³ Nye and Keohane have expanded on their model of complex interdependence that focuses on the interrelation of domestic actors and state interest.²⁹⁴ The central point that both these theories address is that decision makers acting on behalf of a state are concerned with both domestic and international pressure.²⁹⁵ They have to satisfy the demands of their domestic constituency and at the same time bargain on the international level with other states and IOs that equally express certain positions and seek to influence the outcome of negotiations.²⁹⁶ This is something often forgotten on the negotiation table and the OTP ought to take it into account.

The concurrence of states to comply or attempt to induce compliance of situation states with ICC arrest warrants may well depend on the preferences or demands of domestic actors. In this type of bargaining scenario, the involvement of local or transnational NGOs could serve as an instrument of pressure. Local NGOs may reflect the domestic environment and transnational NGOs may create awareness and support within the international civil society. The OTP had already begun to grasp the significance of civil society’s involvement in its 2009–2012 Prosecutorial Strategy where it provided that “the Office of the Prosecutor’s interaction with local and international NGOs is relevant at all stages of its activities including development of policies/practices, prevention, promotion of domestic legislation and proceedings, preliminary examination, investigation, prosecution, cooperation, maximizing the impact of its work[,] and its understanding by

291. BECKER, *supra* note 288.

292. See generally ROBERT O. KEOHANE & JOSEPH S. NYE, *POWER AND INTERDEPENDENCE: WORLD POLITICS IN TRANSITION* (1977).

293. ROBERT D. PUTNAM, *Diplomacy and Domestic Politics: The Logic of Two Level Games*, 42 INT’L ORG. 427, 427 (1988).

294. KEOHANE & NYE, *supra* note 292, at 725.

295. Putnam, *supra* note 293, at 431.

296. *Id.*

victims and affected communities.”²⁹⁷ Although the OTP has not quite yet considered actively involving civil society in the bargaining stage—the bargaining it already engages with is rather elementary anyway—civil society may prove a driving force for success when addressing states with regard to arrest facilitating measures involving the domestic civil societies.

In order to win over domestic civil society within situation states, outreach is also important. The OTP is already engaged in various outreach activities and NGOs can play an important role in closing the gap of how far the OTP can reach due to financial or societal constraints.²⁹⁸ NGOs have played a significant role in the establishment of the ICC and now engage with it through supporting and scrutinizing it.²⁹⁹ They also act as an extension of the Court regarding its communication to the public, narration and justification of its acts, and provision of information to the Court itself.³⁰⁰ More than 2,500 organizations have come together to form the NGO “Coalition for the International Criminal Court” (“CICC”) in order to create a coordinated umbrella for their shared objectives.³⁰¹ Its members include large transnational NGOs such as Amnesty International and Human Rights Watch as well as small and local NGOs.³⁰² Such a network carries an advantage that the ICC does not. The CICC has the ability to communicate with the representatives of a vast number of NGOs while coordinating its work directly with CICC representatives.³⁰³ There are very few other IOs that maintain a symbiotic relationship with NGOs as much as the ICC does. In this respect the ICC has a unique opportunity and capabilities at hand.

In order to make full use of the NGOs, the OTP ought to work in close cooperation with both NGOs and transnational networks to coordinate efforts with them in realizing arrests. At this point, the OTP holds bi-annual round table meetings with civil society representatives organized by the CICC “in order to exchange information and try to harmonize strategies in all those areas.”³⁰⁴ It also engages with relevant non-state actors including NGOs on a daily basis through the JCCD.³⁰⁵ These could be expanded and become more nuanced and targeted as the JCCD becomes a full-fledged diplomatic arm. This way the JCCD would be able to more effectively coordinate strategic, political, and diplomatic action particularly regarding the enforcement of arrest warrants. The danger of neglecting outreach and its importance is clearer in its negative context. A vivid

297. OTP, ICC, PROSECUTORIAL STRATEGY 2009-12, at 15 (Feb. 1, 2010), <http://www.icc-cpi.int/NR/rdonlyres/66A8DCDC-3650-4514-AA62-D229D1128F65/281506/OTP-ProsecutorialStrategy20092013.pdf> [hereinafter OTP PROSECUTORIAL STRATEGY].

298. See SCHIFF, *supra* note 88, at 151-54.

299. *Coalition of the International Criminal Court Fact Sheet*, COALITION FOR INT’L CRIM. CT., http://www.iccnw.org/documents/Coalition_Factsheet.pdf (last visited Nov. 7, 2016).

300. *Id.*

301. *Id.*

302. *Id.*

303. See SCHIFF, *supra* note 88, at 147.

304. OTP PROSECUTORIAL STRATEGY, *supra* note 297, at 15-16.

305. *Id.* at 11.

example is that of the negative perception the Croatian and Serbian civil societies have had towards the ICTY.³⁰⁶ The Tribunal failed to establish any outreach offices at all prior to 2000 and it was not until that same year that it began to translate its press releases into Serbo-Croatian.³⁰⁷ Additionally, the ICTY didn't have any explicit relationship with the existing or new NGOs that were rapidly beginning to form in order to address the post-conflict situation in former Yugoslavia.³⁰⁸ Although the OTP has been so far fairly successful in its outreach, it needs to expand its outreach engagement to activities that begin from the moment an arrest warrant is issued or perhaps even before it is issued. This will in turn facilitate domestic pressure on the government to comply, or at least prevent or mitigate some negative perceptions of the Court and its work.

Conclusion: A Coordination of Campaigns

This Article has sought to identify a trajectory towards increasing the enforcement and success rates of ICC arrest and surrender requests. In order to put all the pieces of the puzzle together, I have argued that the OTP needs to map out a comprehensive strategy to facilitate and manage campaigns that make use of all the means available at its disposal. This will include using the pressure and help coming from all possible actors and sources including states, civil society, and the Court itself.³⁰⁹ The most crucial precondition for launching campaigns designed to lead to the arrest of perpetrators is the OTP's willingness to do so. As set out in this Article, at the moment the OTP has been hesitant lest it is perceived as a political actor, and rather orients itself on the extreme end of the domestic judiciary model. Taking a proactive stance, recognizing the integral part of political realities, and bargaining are all necessary components in order to make full use of the OTP's assets at hand.

The "assets" the OTP has at its disposal to realize the execution of arrest warrants are third states with overlapping interests including member and non-member states, activist states, and a large network of local and transnational NGOs. I have argued that, at the moment, their capabilities often remain unused due to lack of effective coordination that specifically targets recalcitrant states. The OTP, supported by a new diplomatic arm, should adopt a new comprehensive strategy that capitalizes on these actors in order to arrest indictees. I have also argued that transnational campaigns are most successful when joined by multiple actors working on different levels towards the goal of arrest warrant enforcement. Focal points need to be established that are narrowly defined to concentrate action and unify the movement under one banner. Such focal points could be the arrest of indictees in one particular situation state or even the arrest of specific indictees through narrowly defined sub-points—for instance, the

306. See LAMONT, *supra* note 122.

307. *Id.*

308. *Id.*

309. See Gurd, *supra* note 270, at 31.

diplomatic and political isolation of a state, a boycott of contact with indictees who are senior politicians, asset freezes, and travel bans.

When planning the strategy of the campaign, the first step is to use the JCCD to thoroughly assess the situation at hand. The OTP will then identify leverage points to help or pressure the non-compliant state. This will lead to an assessment of what kind of strategy or combination of strategies is required to better approach the situation. Sometimes certain kinds of inducements could prove successful, other times reputational sanctions such as naming and shaming are important, and other times technical and intelligence assistance are needed. A combination of different measures applied from multiple sources is an element currently missing and is what could improve the OTP's fairly poor arrest and surrender rates. The next step is to consider which states, IOs, or regional organizations could best realize the measures needed. The OTP should first approach those actors with overlapping interests in the arrest, or general activism when it comes to enforcement aspects of international justice, and lobby for these measures. While doing so, the OTP should engage with civil society in order to increase the incentives of third states to achieve these measures. At the same time, the OTP should spearhead successful outreach activities within the situation state, in coordination with the local civil society, in order to prevent a negative perception of the Court and positively engage the local civil society to apply pressure on their government.

The adventures of the ad hoc Tribunals offer insight on issues of state compliance that transcend the sterile judicial environment and involve the morbid *realpolitik*. I have argued that the singular nature of the ICC empowered by its potential political dynamic may be incorporated into a model which integrates the judicial mandate with political cognizance. Under this model, the OTP bears significant leverage in productively utilizing the Court's bargaining with situation states as well as towards the international actors that have the ability to affect the success of arrest warrant enforcement. The OTP has the ability to become a significant international player that, backed by an alliance of states and non-state actors, could coordinate efforts in order to bring to justice the perpetrators of the most egregious international crimes. This indeed requires a difficult balance, which often rushes opinion to a blanket contestation against any involvement of the Court with political realities. However, and despite current skepticism, it is important to identify what is becoming all the more so apparent: the interests of international criminal justice and political strategy are heavily intertwined in a world where human rights and international criminal justice are not a universally shared ideal.

